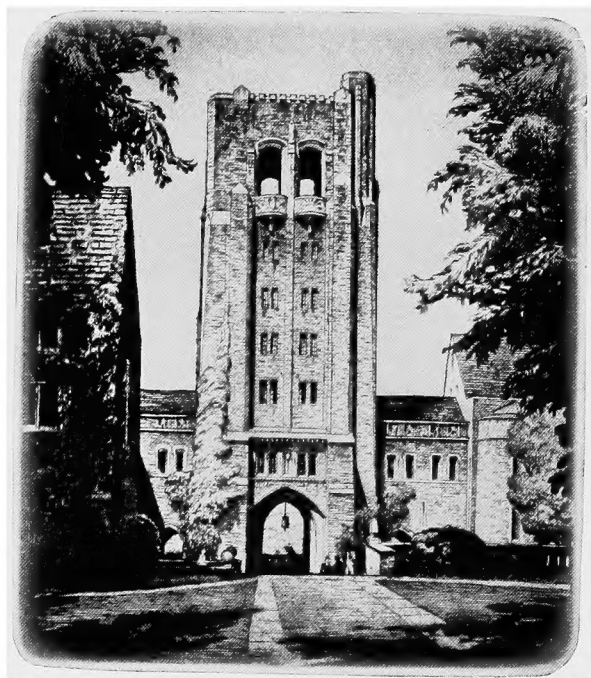


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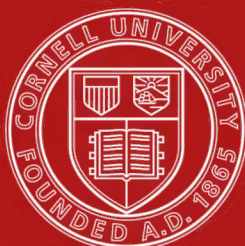
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CASES
ON
THE LAW OF TRUSTS

SELECTED FROM DECISIONS OF
ENGLISH AND AMERICAN COURTS

BY
THADDEUS DAVIS KENNESON
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AMERICAN CASEBOOK SERIES
JAMES BROWN SCOTT
GENERAL EDITOR

ST. PAUL
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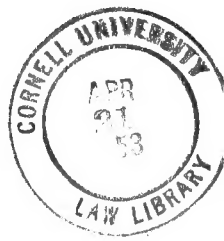
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THE AMERICAN CASEBOOK SERIES

FOR years past the science of law has been taught by lectures, the use of text-books and more recently by the detailed study, in the class-room, of selected cases.

Each method has its advocates, but it is generally agreed that the lecture system should be discarded because in it the lecturer does the work and the student is either a willing receptacle or offers a passive resistance. It is not too much to say that the lecture system is doomed.

Instruction by the means of text-books as a supplement or substitute for the formal lecture has made its formal entry into the educational world and obtains widely; but the system is faulty and must pass away as the exclusive means of studying and teaching law. It is an improvement on the formal lecture in that the student works, but if it cannot be said that he works to no purpose, it is a fact that he works from the wrong end. The rule is learned without the reason, or both rule and reason are stated in the abstract as the resultant rather than as the process. If we forget the rule we cannot solve the problem; if we have learned to solve the problem it is a simple matter to formulate a rule of our own. The text-book method may strengthen the memory; it may not train the mind, nor does it necessarily strengthen it. A text, if it be short, is at best a summary, and a summary presupposes previous knowledge.

If, however, law be considered as a science rather than a collection of arbitrary rules and regulations, it follows that it should be studied as a science. Thus to state the problem is to solve it; the laboratory method has displaced the lecture, and the text yields to the actual experiment. The law reports are in more senses than one books of experiments, and, by studying the actual case, the student co-operates with the judge and works out the conclusion however complicated the facts or the principles involved. A study of cases arranged historically develops the knowledge of the law, and each case is seen to be not an isolated fact but a necessary link in the chain of development. The study of the case is clearly the most practical method, for the student already does in his undergraduate days what he must do all his life; it is curiously the most theoretical and the most practical. For a discussion of the case in all its parts develops analysis, the comparison of many cases establishes a general principle, and

the arrangement and classification of principles dealing with a subject make the law on that subject.

In this way TRAINING AND KNOWLEDGE, the means and the end of legal study, go hand and hand.

The obvious advantages of the study of law by means of selected cases make its universal adoption a mere question of time.

The only serious objections made to the case method are that it takes too much time to give a student the requisite knowledge of the subject in this way and that the system loses sight of the difference between the preparation of the student and the lifelong training of the lawyer. Many collections of cases seem open to these objections, for they are so bulky that it is impossible to cover a particular subject with them in the time ordinarily allotted to it in the class. In this way the student discusses only a part of a subject. His knowledge is thorough as far as it goes, but it is incomplete and fragmentary. The knowledge of the subject as a whole is deliberately sacrificed to training in a part of the subject.

It would seem axiomatic that the size of the casebook should correspond in general to the amount of time at the disposal of instructor and student. As the time element is, in most cases, a nonexpansive quantity, it necessarily follows that, if only a half to two-thirds of the cases in the present collections can be discussed in class, the present casebooks are a third to a half too long. From a purely practical and economic standpoint it is a mistake to ask students to pay for 1,200 pages when they can only use 600, and it must be remembered that in many schools, and with many students in all schools, the matter of the cost of casebooks is important. Therefore, for purely practical reasons, it is believed that there is a demand for casebooks physically adapted and intended for use as a whole in the class-room.

But aside from this, as has been said, the existing plan sacrifices knowledge to training. It is not denied that training is important, nor that for a law student, considering the small amount of actual knowledge the school can hope to give him in comparison with the vast and daily growing body of the law, it is more important than mere knowledge. It is, however, confidently asserted that knowledge is, after all, not unimportant, and that, in the inevitable compromise between training and knowledge, the present casebooks not only devote too little attention relatively to the inculcation of knowledge, but that they sacrifice unnecessarily knowledge to training. It is believed that a greater effort should be made to cover the general principles of a given subject in the time allotted, even at the expense of a considerable sacrifice of detail. But in this proposed readjustment of the means to the end, the fundamental fact cannot be overlooked that law is a developing science and that its present can only be understood through the medium of its past. It is recognized as imperative that a sufficient number of cases be given under each topic

treated to afford a basis for comparison and discrimination; to show the development of the law of the particular topic under discussion; and to afford the mental training for which the case system necessarily stands. To take a familiar illustration: If it is proposed to include in a casebook on Criminal Law one case on abortion, one on libel, two on perjury, one on larceny from an office, and if in order to do this it is necessary to limit the number of cases on specific intent to such a degree as to leave too few on this topic to develop it fully and to furnish the student with training, then the subjects of abortion, libel, perjury, and larceny from an office should be wholly omitted. The student must needs acquire an adequate knowledge of these subjects, but the training already had in the underlying principles of criminal law will render the acquisition of this knowledge comparatively easy. The exercise of a wise discretion would treat fundamentals thoroughly: principle should not yield to detail.

Impressed by the excellence of the case system as a means of legal education, but convinced that no satisfactory adjustment of the conflict between training and knowledge under existing time restrictions has yet been found, the General Editor takes pleasure in announcing a series of scholarly casebooks, prepared with special reference to the needs and limitations of the class-room, on the fundamental subjects of legal education, which, through a judicious rearrangement of emphasis, shall provide adequate training combined with a thorough knowledge of the general principles of the subject. The collection will develop the law historically and scientifically; English cases will give the origin and development of the law in England; American cases will trace its expansion and modification in America; notes and annotations will suggest phases omitted in the printed case. Cumulative references will be avoided, for the footnote may not hope to rival the digest.

The law will thus be presented as an organic growth, and the necessary connection between the past and the present will be obvious.

The importance and difficulty of the subject as well as the time that can properly be devoted to it will be carefully considered so that each book may be completed within the time allotted to the particular subject.

It is equally obvious that some subjects are treated at too great length, and that a less important subject demands briefer treatment. A small book for a small subject.

In this way it will be alike possible for teacher and class to complete each book instead of skimming it or neglecting whole sections; and more subjects may be elected by the student if presented in shorter form based upon the relative importance of the subject and the time allotted to its mastery.

Training and knowledge go hand in hand, and Training and Knowledge are the keynotes of the series.

If it be granted that all, or nearly all, the studies required for admission to the bar should be studied in course by every student—and the soundness of this contention can hardly be seriously doubted—it follows necessarily that the preparation and publication of collections of cases exactly adapted to the purpose would be a genuine and by no means unimportant service to the cause of legal education. And this result can best be obtained by the preparation of a systematic series of casebooks constructed upon a uniform plan under the supervision of an editor in chief.

For the basis of calculation the hour has been taken as the unit. The General Editor's personal experience, supplemented by the experience of others in the class-room, leads to the belief that approximately a book of 400 pages may be covered by the average student in half a year of two hours a week; that a book of 600 pages may be discussed in class in three hours for half a year; that a book of 800 pages may be completed by the student in two hours a week throughout the year; and a class may reasonably hope to master a volume of 1,000 pages in a year of three hours a week. The general rule will be subject to some modifications in connection with particular topics on due consideration of their relative importance and difficulty, and the time ordinarily allotted to them in the law school curriculum.

The following subjects are deemed essential in that a knowledge of them (with the exception of International Law and General Jurisprudence) is universally required for admission to the bar:

Administrative Law.	Insurance.
Agency.	International Law.
Bills and Notes.	Jurisprudence.
Carriers.	Mortgages.
Contracts.	Partnership.
Corporations.	Personal Property, including the Law of Bailment.
Constitutional Law.	Real Property. { ^{1st Year.} ^{2d} " " ^{3d} " "
Criminal Law.	Public Corporations.
Criminal Procedure.	Quasi Contracts.
Common-Law Pleading.	Sales.
Conflict of Laws.	Suretyship.
Code Pleading.	Torts.
Damages.	Trusts.
Domestic Relations.	Wills and Administration.
Equity.	
Equity Pleading.	
Evidence.	

International Law is included in the list of essentials from its intrinsic importance in our system of law. As its principles are simple in comparison with municipal law, as their application is less technical,

and as the cases are generally interesting, it is thought that the book may be larger than otherwise would be the case.

As an introduction to the series a book of Selections on General Jurisprudence of about 500 pages is deemed essential to completeness.

The preparation of the casebooks has been intrusted to experienced and well-known teachers of the various subjects included, so that the experience of the class-room and the needs of the students will furnish a sound basis of selection.

While a further list is contemplated of usual but relatively less important subjects as tested by the requirements for admission to the bar, no announcement of them is made at present.

The following gentlemen of standing and repute in the profession are at present actively engaged in the preparation of the various casebooks on the indicated subjects:

George W. Kirchwey, Dean of the Columbia University, School of Law. *Subject, Real Property.*

Nathan Abbott, Professor of Law, Columbia University. (Formerly Dean of the Stanford University Law School.) *Subject, Personal Property.*

~~Frank Irvine~~ ^{Hinton}, Dean of the Cornell University School of Law. *Subject, Evidence.*

Harry S. Richards, Dean of the University of Wisconsin School of Law. *Subject, Corporations.*

James Parker Hall, Dean of the University of Chicago School of Law. *Subject, Constitutional Law.*

William R. Vance, Dean of the George Washington University Law School. *Subject, Insurance.*

Charles M. Hepburn, Professor of Law, University of Indiana. *Subject, Torts.*

William E. Mikell, Professor of Law, University of Pennsylvania. *Subjects, Criminal Law and Criminal Procedure.*

George P. Costigan, Jr., Professor of Law, Northwestern University Law School. *Subject, Wills and Administration.*

Floyd R. Mechem, Professor of Law, Chicago University. *Subject, Damages.* (Co-author with Barry Gilbert.)

Barry Gilbert, Professor of Law, University of Illinois. *Subject, Damages.* (Co-author with Floyd R. Mechem.)

Thaddeus D. Kenneson, Professor of Law, University of New York. *Subject, Trusts.*

Charles Thaddeus Terry, Professor of Law, Columbia University. *Subject, Contracts.*

- Albert M. Kales, Professor of Law, Northwestern University. *Subject, Persons.*
- Edwin C. Goddard, Professor of Law, University of Michigan. *Subject, Agency.*
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- Wm. Underhill Moore, Professor of Law, University of Wisconsin. *Subject, Bills and Notes.* (Co-author with Howard L. Smith.)
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- Crawford D. Hening, Professor of Law, University of Pennsylvania. *Subject, Suretyship.*
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- Eugene A. Gilmore, Professor of Law, University of Wisconsin. *Subject, Partnership.*
- Ernst Freund, Professor of Law, University of Chicago. *Subject, Administrative Law.*
- Frederick Green, Professor of Law, University of Illinois. *Subject, Carriers.*
- Ernest G. Lorenzen, Professor of Law, George Washington University. *Subject, Conflict of Laws.*
- Frederic C. Woodward, Dean of the Stanford University Law School. *Subject, Sales.*
- James Brown Scott, Professor of Law, George Washington University; formerly Professor of Law, Columbia University, New York City. *Subjects, International Law; General Jurisprudence; Equity.*

JAMES BROWN SCOTT,
General Editor.

WASHINGTON, D. C., September, 1911.

Following are the books of the Series now published, or in press:

Administrative Law	Partnership
Bills and Notes	Persons
Carriers	Pleading
Conflict of Laws	Suretyship
Criminal Law	Trusts
Criminal Procedure	Wills and Administration
Damages	

PREFACE

IN SOME cases the statement of facts has been wholly omitted, in others abbreviated by omissions, and in still others entirely rewritten. With few exceptions the arguments of counsel have been omitted. Many of the opinions have been abbreviated by omissions, but in no instance has the original language been changed. The author wishes to acknowledge his great indebtedness to James Barr Ames, late Dean of the Harvard Law School, in whose death all legal scholars must feel an irreparable loss.

THADDEUS D. KENNESON.

October 1, 1911.

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CASES ON THE LAW OF TRUSTS.

CHAPTER I.

THE NATURE AND REQUISITES OF TRUSTS.

SECTION 1.—THE ESSENTIALS OF EVERY TRUST.

To constitute a valid trust three things are necessary, viz.: A trustee, another person, the beneficiary, and property, and without each of the three a trust cannot exist.—Earl, J., in *ROSE v. HATCH* (1891) 125 N. Y. 427, 431, 432, 26 N. E. 467.

SECTION 2.—THE CREATION OF TRUSTS.¹

WARNER v. BATES.

(Supreme Judicial Court of Massachusetts, 1867. 98 Mass. 274.)

Bill in equity filed September 4, 1865, by a son of Sarah I. Bates, deceased, seeking a decree to enforce performance by the respondent, his stepfather, of a trust created by her will.

¹ A trust is what Dean Langdell in 1 *Harvard Law Review*, 59, 65-70, has described as an "equitable personal obligation." The creation of every trust is the creation of an obligation and a right. The obligation is imposed upon the trustee in favor of the cestui que trust in respect of the trust res. The right is vested in the cestui que trust and enables him to enforce the obligation so imposed upon the trustee. Every equitable obligation like every legal obligation is created by the state and enforced by its judicial tribunals. It may be said with sufficient accuracy that every trust is created by equity itself and enforced by a court of equity. In creating some trusts the object of equity seems to be to effect the actual or presumed intention of the parties. In creating other trusts the object of equity seems to be to effect what it considers justice without regard to the intention of the parties. The cases under this subdivision are intended to enforce this distinction.

The bill alleged that on December 12, 1833, the deceased, a widow, having a daughter and two sons, of whom complainant was one, and owning property to the amount of more than one hundred thousand dollars, was married to respondent and her property secured by a settlement from any marital right or claim which otherwise he might have thereto: that thereafter, until her death on May 17, 1859, she and respondent, with these children, and with another daughter, the issue of this marriage, lived together as one family in her house, where she and her children had formerly resided; that the expenses of maintaining the family in a liberal style suitable to their circumstances were defrayed chiefly from the income of her property, the respondent having but little property of his own, but acting as the head of the family, having the general care thereof, and managing the funds for its maintenance; and that she left a will of which she named the respondent sole executor, and an estate of which there was a large residue after paying her debts.

The will was set forth in the bill and disposed of the estate during respondent's life as follows:

"I give and bequeath unto my husband, George Bates aforesaid, the use, income and improvement of all the estate, real, personal and mixed, of which I shall die seized and possessed, for and during the term of his natural life, in the full confidence that upon my decease he will, as he has heretofore done, continue to give and afford my children" [enumerating them], "such protection, comfort and support as they or either of them may stand in need of."

Upon the respondent's death, it gave one-half of the estate to complainant and his brother; and the other half to three persons upon certain trusts for the two daughters.

The bill further alleged that, after the death of testatrix, respondent took possession of the estate; that complainant with his brother and unmarried sister continued to reside in the house as before, and to receive from the respondent, without payment or charge therefor, the benefits and privileges which children of their condition usually receive in their own families, until, on or about April 1, 1863, respondent, in complainant's absence, removed complainant's effects from the house, and ever since forbade and prevented him from coming into it, and neglected and refused to give him the said benefits and privileges which he had before enjoyed, or make him any reasonable compensation instead thereof. The bill then alleged his means of support and that they were wholly inadequate thereto; that he stood in need of such support as he had been accustomed to receive in his mother's lifetime; and that the respondent, though well aware thereof and often requested therefor, refused to give it. Respondent filed a general demurrer and the case was reserved by Chapman, J., for the consideration of the full court.

BIGELOW, C. J. We see no sufficient ground for calling in question the wisdom or policy of the rule of construction uniformly ap-

plied to wills in the courts in England and in most of the United States, that words of entreaty, recommendation or wish, addressed by a testator to a devisee or legatee, will make him a trustee for the person or persons in whose favor such expressions are used, provided testator has pointed out with clearness and certainty the objects of the trust, and the subject matter on which it is to attach or from which it is to arise and be administered. The criticisms which have been sometimes applied to this rule by text writers and in judicial opinions will be found to rest mainly on its applications in particular cases, and not to involve a doubt of the correctness of the rule itself as a sound principle of construction. Indeed, we cannot understand the force or validity of the objections urged against it, if care is taken to keep it in subordination to the primary and cardinal rule that the intent of the testator is to govern, and to apply it only where the creation of a trust will clearly subserve that intent. It may sometimes be difficult to gather that intent, and there is always a tendency to construe words as obligatory in furtherance of a result which accords with a plain moral duty on the part of a devisee or legatee, and with what it may be supposed the testator would do if he could control his action. But difficulties of this nature, which are inherent in the subject matter, can always be readily overcome by bearing in mind and rigidly applying in all such cases the test, that to create a trust it must clearly appear that the testator intended to govern and control the conduct of the party to whom the language of the will is addressed, and did not design it as an expression or indication of that which the testator thought would be a reasonable exercise of the discretion which he intended to repose in the legatee or devisee. If the objects of the supposed trust are certain and definite; if the property to which it is to attach is clearly pointed out; if the relations and situation of the testator and the supposed cestuis que trust are such as to indicate a strong intent and motive on the part of the testator in making them partakers of his bounty; and above all, if the recommendatory or precatory clause is so expressed as to warrant the inference that it was designed to be peremptory on the donee; the just and reasonable interpretation is, that a trust is created, which is obligatory and can be enforced in equity as against the trustee by those in whose behalf the beneficial use of the gift was intended. [Authorities cited.]

Turning now to the clause of the will which is the subject of the present controversy, it seems to us that it does not leave the support of the children of the testatrix to the discretion of the respondent, to be afforded or withheld at his pleasure, but that the devise to him was made on the trust that he should furnish such support so long as he lived and received the income of her property. The objects of the trust are distinctly named. The nature and extent of the trust is clearly stated and defined. It was such a sum of money as might be necessary to the comfort and support of each

one of the children of the testatrix. Nor is the amount of the beneficial interest left indefinite or without a standard by which it can be measured. It is to be such comfort and support "as they or either of them may stand in need of." The extent of such a beneficial interest can be ascertained and enforced by suitable proceedings either at law or in equity. *Thorp v. Owen*, 2 Hare, 607, 610. *Sanderson's Trust*, 3 Kay & Johns. 497-507. *Farwell v. Jacobs*, 4 Mass. 634. In the last case, it was held by this court that an action at law would lie against an executor who was directed by the testator to furnish support to a person in whose behalf the suit was brought. But in the present case, the phrase "comfort and support" is made more definite and certain by an express reference in the terms of the gift to the continuance of a previously existing state of things in the family of the testatrix and her husband, in which the children of the former had resided and received support during her life. Nor is it to be overlooked that the language addressed to the respondent in the clause of the will under consideration is not confined to words expressive of a wish or recommendation only, but the property is given to the respondent "in the full confidence" that he will afford to the children of the testatrix adequate support. Although these words would not necessarily create a trust in a case where a different intent is clearly indicated, they are nevertheless strong and significant to show that such was the purpose of the testatrix, when taken in connection with other facts and circumstances which have a like tendency. *Wright v. Atkins*, 17 Ves. 255, 258, 261. *Meredith v. Henrage*, 1 Sim. 542, 556.

We think it also worthy of remark in that connection that it is not left to the respondent to determine the amount or extent of the support which he was to afford to the children. The gift to him is not in confidence that he will give them such support as he may think proper, or as in his judgment they may need, but to such an extent as they shall in fact "stand in need of." It was to be measured, not by the exercise of his discretion in the matter, but by the actual wants of the children.

The view which we have taken of the construction of the clause of the will by which the property of the testatrix is given to the respondent for his life is greatly strengthened when we take into consideration the relations of all the parties toward each other, the nature and condition of the property which was the subject of the gift, and the ultimate disposition which was made of it by the will after the death of the respondent. The objects for whose comfort and support the testatrix was aiming to provide were her own children, three of them by a former husband, and one by the respondent. They had always lived in the family of the testatrix and her husband, and received all needful support as members thereof; they had no property of their own; and, if they were deprived after her death during the life of respondent of all benefit of the estate of their

mother, from which the support of the family had been chiefly drawn during her life, they would not only lose the support which they had previously enjoyed, but would be in danger of being left without adequate means of support, and without habits or abilities which would enable them to obtain a livelihood. To these children she gives the entire beneficial interest in her whole estate after the death of her husband. Is it reasonable to suppose that under such circumstances she intended that these children, who were so clearly the chief objects of her bounty, should be left during the lifetime of her husband without any such right or interest in her estate as would enable them to enforce a claim for support in the event that, from alienation of feeling, imbecility of mind, or any other like cause, the respondent should be unwilling or unable to comply with her wish or to exercise a discretion in their behalf?

It is suggested that in other clauses of the will, in which she creates a trust in favor of her daughters for their respective shares of her estate, of which they are to have the entire income after the death of her husband, she does not use words of entreaty, request and recommendation, but apt and technical words by which to establish a trust in their behalf. But we think this suggestion is not entitled to much weight. She might well express herself in a different language when addressing her husband from that which she would use toward strangers, and at the same time intend a similar result. Words of confidence, entreaty and recommendation were natural and appropriate when used to express the will of a testatrix who intended to direct and control the conduct of her husband in a matter in which the right to give directions and to control belonged to her. In such a case, the words used by Lord Loughborough are applicable: "Where a person recommends to another who is independent of him, there is nothing imperative; but if he recommends that to be done by a person whom he has a right to order to do it, the mode is only civility." *Malim v. Keighley*, 2 Ves. Jr. 333, 529.

After a careful consideration of the case, we are of opinion that the will creates a trust in favor of the complainant, which it is our duty, sitting as a court of equity, to enforce. Decree accordingly.

MARTIN v. FUNK, Adm'r, and Others.

(Court of Appeals of New York, 1878. 75 N. Y. 134, 31 Am. Rep. 446.)

The defendants appeal from a General Term judgment of the Supreme Court which affirmed a Special Term judgment for plaintiff.

CHURCH, C. J.¹ The intestate Mrs. Boone, in 1866, deposited in the Citizens' Savings Bank \$500, declaring at the time that she wanted the account to be in trust for Lillie Willard, who is the plaintiff.

¹ Part of the opinion is omitted.

The account was so entered, and a pass-book delivered to the intestate, which contained these entries: "The Citizens' Savings Bank in account with Susan Boone, in trust for Lillie Willard. 1866, March 23. \$500."

A deposit of the same amount, and in the same manner, was made in trust for Kate Willard, now Mrs. Brown. This money belonged to the intestate at the time of the deposits. The plaintiff and Mrs. Brown are sisters, and were at the time, of the age respectively of eighteen and twenty, and were distant relatives of the intestate, their mother being a second cousin. The intestate retained possession of the pass-books until her death in 1875, and the plaintiff and her sister were ignorant of the deposits until after that event. The money remained in the bank with its accumulated interest until the death of the intestate except that she drew out one year's interest. Mrs. Brown assigned to the plaintiff her interest in the deposit purporting to have been made for her benefit, and the action is brought against the administrator of the intestate and the bank for the delivery of the pass-books and the recovery of the money. * * * It is clear that a person *sui juris*, acting freely and with full knowledge has the power to make a voluntary gift of the whole or any part of his property, while it is well settled that a mere intention, whether expressed or not is not sufficient, and a voluntary promise to make a gift is *nudum pactum*, and of no binding force. (*Kekewich v. Manning*, 50 Eng. Ch. 175, and cases cited.) The act constituting the transfer must be consummated, and not remain incomplete, or rest in mere intention, and this is the rule whether the gift is by delivery only, or by the creation of a trust in a third person, or in creating the donor himself a trustee. Enough must be done to pass the title, although when a trust is declared, whether in a third person or the donor, it is not essential that the property should be actually possessed by the *cestui que trust*, nor is it even essential that the latter should be informed of the trust. * * *

The contention of the defendant is that the transaction did not transfer the property and that there was no sufficient declaration of trust and that by retaining the pass-books the intestate never parted with the control of the property. If what she did was sufficient to constitute herself a trustee, it must follow that whatever control she retained would be exercised as trustee, and the right to exercise it would not be necessarily inconsistent with the completeness of the trust. * * *

No particular form of words is necessary to constitute a trust, while the act or words relied upon must be unequivocal, implying that the person holds the property as trustee for another.

Let us now consider the case in hand. In form at least the title to the money was changed from the intestate individually, to her as trustee. She stated to the bank that she desired the money to be thus deposited. It was so done by her direction, and she took a voucher

to herself in trust for the plaintiff. Upon these facts what other intent can be imputed to the intestate than such as her acts and declarations imported, and did they not import a trust? There was no contingency or uncertainty in the circumstances, and I am unable to see wherein it was incomplete. The money was deposited unqualifiedly and absolutely in trust, and the intestate was the trustee. It would scarcely have been stronger, if she had written in the pass-book, "I hereby declare that I have deposited this money for the benefit of the plaintiff and I hold the same as trustee for her."

This would have been a plain declaration of trust, and accompanied as it was with a formal transfer to herself in the capacity of trustee would have been deemed sufficient under the most rigid rules to be found in any of the authorities. It seems to me that this was the necessary legal intentment of the transaction, and that it was sufficient to pass the title. The retention of the pass-book was not necessarily inconsistent with this construction. She must be deemed to have retained it as trustee. The book was not the property, but only the voucher for the property which after the deposit consisted of the debt against the bank. * * *

As notice to the cestui que trust was not necessary, and as the retention of the pass-books was not inconsistent with the completeness of the act, the case is peculiarly one to be determined by this test; did the intestate constitute herself a trustee? After a careful consideration of the case in connection with the established rules applicable to the subject, and the authorities, I think this question must be answered in the affirmative. It was not done in express formal terms, but such is the fair legal import of the transaction. * * *

Judgment affirmed.

DILROW v. BONE.

(In Chancery, before Vice Chancellor Sir John Stuart, 1862. 3 Giffard, 538.)

By an indenture dated June 30, 1835, between Edmund Bone and Mary, his wife, of the one part, and John Fulleck and Richard Hearsey, of the other part, after reciting that by a previous indenture and fine levied in pursuance thereof certain lands had been conveyed to William Hogflesh and his heirs upon such trusts as Edmund Bone and Mary, his wife, should by deed appoint and that they were desirous of exercising said power, the said Edmund Bone and Mary, his wife, did appoint that, immediately after the decease of the survivor of them, all said lands should go, remain and be "unto and to the use of the said John Fulleck and said Richard Hearsey, their executors, administrators and assigns" upon trust to sell and divide the proceeds into seven equal parts and to pay one part to each of the seven children of Edmund and Mary Bone respectively.

Mary Boné died in 1836 and Edmund Bone in 1860. Shortly aft-

er his death the present trustees proceeded to a sale when, upon investigation of the title, it was found that (as the bill alleged), "by mistake or inadvertence" the estate was limited after the death of the survivor of the two settlors to the trustees, their "executors, administrators, and assigns" only, and not their "heirs," so that the legal estate was now vested in the infant defendant William Bone, as heir of William Bone deceased, the eldest son of Edmund Bone, the settlor. This bill was filed by the six surviving children of Edmund and Mary Bone against the infant heir and trustees to have the infant heir declared a trustee of the hereditament comprised in the indenture of June 30, 1835, and the legal estate vested in him vested in said trustees upon the trusts of said indenture, or the said indenture, if necessary, rectified.

THE VICE CHANCELLOR. The instrument, which contains a clear declaration of trust, professes to operate by an appointment of trustees in exercise of a power, and it also contains clear and distinct words of conveyance in a further witnessing part. It is impossible to say that by the operation of those words of conveyance some legal estate did not pass from the settlor. Upon the intention apparent from the whole scope of the deed and its language it is certain that the intention was to give an absolute legal estate to the two persons who are named as trustees, and upon whose legal estate the trust is grafted. Lord Eldon, in the case of *Ellison v. Ellison* [6 Ves. 656-662], says: "I take the distinction to be, that if you want the assistance of the Court to constitute you cestui que trust, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you cestui que trust, as upon a covenant to transfer stock, etc.; if it rests on covenant, and is purely voluntary, this Court will not execute that voluntary covenant; but if the party has completely transferred stock, etc., though it is voluntary, yet, the legal conveyance being effectually made,—the equitable interest will be enforced by this Court." It is true that Lord Eldon says, "has completely transferred or completely conveyed;" but I cannot understand upon what principle it can be said that, if there was a transmutation of possession—there being a determinate estate created in intelligible terms, but with this effect, that what upon the whole scope or the instrument was intended to vest the fee simple in the trust conveyed only the freehold for life—this Court should decline to enforce the performance of the trust. I consider it, therefore, my duty in this case to give the relief in substance, as prayed by the bill. I do not think it necessary to go at length into the authorities that have been cited, because there were two cases before me not long ago: *Airey v. Hall* [3 Sm. & Giff. 315], and *Voyle v. Hughes* [2 Sm. & Giff. 18], in which I endeavored to distinguish some of the various decisions which had been made on the subject of voluntary gifts. The declaration will be that the heir of William Bone is a trustee, and there will be an order that the legal estate may be vested in

trustees to be appointed by the court. In my opinion a trust is so attached to the property in this case that the infant heir of the settlor holds the estate with this trust attached to it in his hands.

ANONYMOUS.

(In Chancery, before Lords Commissioners Trevor, Rawlinson and Hutchins. 1692. Freeman's Chancery Cases, 123.)

If a man makes a conveyance to A. in consideration of money paid by B., A. is but a trustee for B. by virtue of this resulting trust notwithstanding the statute of frauds and perjuries, although no trust be declared in writing.

WOODMAN v. MORREL and Wife.

(In Chancery, before Justice Atkins, 1678. Freeman's Chancery Reports, 32.)

And in this case, these differences were taken: 1. Where a man purchaseth land in the name of a stranger, and of a child; for in the first case it is presumed a trust for the purchaser; but in the latter, the presumption is, that it is a provision for the child, if there be no declaration of the father to the contrary.

LANE and Others v. DIGHTON and Others.

(In Chancery, before the Master of the Rolls, Sir Thomas Clarke, 1762. Ambler, 409.)

By indenture of 16th July, 1748, made after the marriage of John Dighton with the said Elizabeth, her fortune, which was personalty, and amounted to more than £8000, was assigned to four persons upon trust, to pay the interest to him for life, and then to his wife for life, and then the principal to their children, as they or the survivor should appoint: and in default of appointment, to all of them. On 24th January, 1754, Dighton bought at an auction an estate in Oxfordshire, called Sherborne-Woods, for £6600, and made a deposit of £660. Mr. Dighton, not having sufficient of his own, prevailed on the trustees to let him have £4010. 10s. of the trust money to make up the £5940., the balance of the purchase price. He was let into possession of the estate and afterwards received a conveyance of it. He also bought another estate, at Ascot, in Oxfordshire. He died intestate on 1st January, 1761.

The bill was brought for payment of debts, and to have the settlement made good out of the personal estate and distribution of the

residue. The widow and younger children, by their answer, said that part of the trust money had been laid out in the purchase of Sherborne-Woods and Ascot Estate, and ought to be considered as the trust money.

The cause came on to be heard on May 8th, 1761, by consent before Sir Thomas Clarke, Master of the Rolls, when the question, whether the estate can be charged with any part of the trust money? was debated.

On the part of the plaintiff, James Lucy Dighton, it was argued by Mr. Capper, That if trustee lays out trust money in land, the court will charge the land with it, upon admission of the trustees, but will not receive evidence to prove it; for that would be contrary to the statute of frauds, which requires trusts of lands to be in writing, unless by operation of law: as if land is bought in the name of A., evidence may be given that the purchase money was paid by B.; that is a trust raised by operation of law; and the cases of *Kirk v. Webb*, Prec. in Chancery, 84, and of *Halcot v. Marchent*, Prec. Ch. 168, were cited as authorities on the general principle. It was further said, that if evidence could be received, it ought to prove precisely in what land the money was laid out. That in this case it is only loosely said, that the trust money was from time to time laid out in land.

On the other side it was argued by me, on the behalf of the defendants, that the evidence ought to be read, and that it is sufficient to ground an inquiry, if not to make an immediate decree.

His Honour, after taking time for consideration, on 8th June following gave his opinion:

The general question is, whether the court can follow the trust money into land, consistently with the statute of frauds and perjuries, and the cases determined upon it? It divides itself into two questions: 1st, Whether the evidence can be received? 2d, Whether it is sufficient, if received?

For the plaintiffs were cited the cases of *Kirk v. Webb*, and *Halcot v. Marchent*, and the reason upon which those cases were determined; that is, that there must be an express trust in writing to affect lands, and that evidence cannot be received. The only cases excepted in the statute are, operation of law, and extinguishment: as if A. buys land in the name of B., A. may prove that he paid the consideration, and there will be a resulting trust for him: so where there is a declaration as to part of the land, the rest results.

On the other side was cited *Ryal v. Ryal*, in Ch. 4th February, 1739. In that case compassion took place, and inquiry was directed, whether any of the money was laid out in land. In *Jones v. Jones*, 10th July, 1752, the same inquiry was directed. In *Hardacre v. Massenger*, 10th March, 1753, Sir John Strange declared the land liable, without directing an inquiry. If it was *res integra*, I should think the evidence not admissible within the statute. But I must not be wiser than my

predecessors; therefore refer it to the Master to inquire whether any, and what part of the trust money, was laid out in the purchase of the Sherborne-Woods and Ascot estate, or either, and which of them.

The cause coming on for further directions on 27th January, 1762, his Honour decreed as follows: It appearing by the Master's report, that the sum of £4010. 10s. 1d. part of the trust money, or funds, being part of the portion of the defendant Elizabeth Dighton, agreed to be secured by her marriage articles of 16th July, 1748, was invested by John Dighton, her husband, together with other money of his own, in the purchase of Sherborne-Woods estate, declare, that the same ought to be considered in the same plight and condition as if the same had not been invested, and to be subject to the trusts and limitations in the said articles.

WRIGHT v. BATES and NILES.

(Supreme Court of Vermont, 1841. 13 Vt. 341.)

This was an appeal from a decree of the Court of Chancery, allowing the plaintiff to redeem certain lands.

Wright borrowed of the defendant, Bates, \$300 and on May 2, 1821, made a deed of certain land to him absolute in form. Wright continued in possession of the land. On June 26, 1834, Bates conveyed the land to the defendant, Niles. Niles brought an action of ejectment against Wright and secured judgment at the June Term of the Bennington County Court in 1836.

Wright then brought this bill in equity alleging that the deed to Bates was given as a mortgage to secure the payment of \$325 and that Bates agreed to reconvey the land to him on being paid \$325; that Niles bought the land of Bates with notice of plaintiff's rights; that the plaintiff on August 16, 1836, tendered the amount due. The bill prayed that Niles be decreed to reconvey to the plaintiff the mortgaged premises on payment of the amount due and that the action of ejectment be enjoined and for further relief.

BENNETT, J.¹ This case comes before this court by an appeal from the court of chancery. The object of the orator is to be let in to redeem, and the first question presented for our consideration is, whether the deed from Wright to Bates is to be treated as a mortgage, between the immediate parties. It is well settled law, in this state, that a court of chancery will treat an absolute deed of real estate, given to secure the payment of a debt, as a mortgage, as between the immediate parties, especially if the grantor continues to remain in possession, though the defeasance rests wholly in parol. *Campbell v. Worthington*, 6 Vt. R. 448. *Baxter v. Willey*, 9 Vt. R. 280, 31 Am. Dec. 623. When there is an attempt to set up such an instrument as an absolute conveyance, there is a fraudulent application or use

¹ Part of the opinion is omitted.

made of it; and this is a proper ground upon which chancery may proceed. Though Bates, in his answer, denies that the deed was given or accepted as a mortgage, or that any parol agreement was made, at the time of its execution, that it should be considered otherwise than as an absolute conveyance, yet, from the testimony of Danforth, we learn that he, in the spring of 1821, went with the orator to Bates, to assist him in getting a loan of three hundred dollars, and that Bates agreed to accomodate him with the loan, provided the orator would secure him with a deed of the lands described in the bill, and pay him an interest of twenty-five dollars a year for the use of the money, which proposition was then agreed to, though the writings were not then made. A short time after this, the witness says, he was informed by both parties, that the agreement had been carried into effect. Samuel Wright also testifies that in the spring of 1823 he was employed to draw the lease set forth in the answer of Bates; and that at that time he learned from him that, at some previous time, he had let the orator have \$325, and that he took a deed of the premises in question, and promised to give him a time to redeem them in, but that no time was fixed, and he wanted it done in the lease. When, in addition to this, we see that the value of the property, as shown by a great number of witnesses, was, in 1821, about \$1000, and that the orator had been, for a great length of time, permitted to remain in possession, we can have no reasonable doubt that this land was conveyed as a security for the money advanced, and that, in equity, the conveyance should be treated as a mortgage.

* * *

Niles, in his answer, admits that he was informed by the orator, a short time before Bates conveyed to him, that he (Bates) was bound to reconvey the premises to him upon the payment of a given sum of money, and that he was still indebted to Bates, on account of the lands conveyed in about the sum of nine hundred dollars, and it appears that Wright had remained in the quiet possession from 1821 down to 1836, when Niles commenced his action of ejectment against him. Upon this state of facts it is evident that Niles can stand in no better situation than Bates. The fact that Wright remained in the open, peaceable, and exclusive possession and improvement of the land conveyed to Bates, for so great a length of time, is sufficient of itself, to affect Niles with notice of the orator's right of redemption. *Rublee v. Mead*, 2 Vt. R. 544. *Griswold v. Smith*, 10 Vt. R. 452. Niles, then, having purchased with notice of Wright's equity, must come in subject to it. So far as Wright is concerned, it is a purchase mala fide. * * *

Niles is the immediate grantee of Bates, and his rights are dependent upon those of his grantor. If he is affected with notice, he takes the title, subject to all the equities that existed against Bates.

DOWD v. TUCKER.

(Supreme Court of Errors of Connecticut, 1874. 41 Conn. 197.)

Bill in equity to compel the conveyance of real estate. The following facts were found by a committee:

The petitioner is a niece, and the respondent a nephew of Frances M. Hayden, who died Sept. 3rd, 1870.

On the 27th day of May, 1863, Mrs. Hayden made a will, by which she gave all her property to the respondent, which will, after her death, was proved as her last will and testament.

At the time of her death she was the owner of one-half of a dwelling house and lot, worth \$750, being the property in dispute between the parties.

About two weeks before her death Mrs. Hayden desired and intended to give to the petitioner her part of the dwelling house, and to change her will accordingly, but was unwilling to do so without the consent of the respondent. The petitioner thereupon caused a codicil to be prepared giving to the petitioner the dwelling house. This codicil was presented to her, upon which she, without signing it, expressed a desire to see the respondent. The respondent was then called into the room, and she informed him that she wanted to give her half of the dwelling house to the petitioner, if he was willing, and asked him if he was willing, saying again that she wanted to do so. The respondent replied that she was weak, and that she need not trouble herself to sign the paper, but that he would deed the property to the petitioner and would do just as she wanted to have him. The testatrix expressed herself satisfied that the respondent would do as he agreed, and did not sign the codicil. This interview was on Sunday, about 2 o'clock in the afternoon. Mrs. Hayden at that time was capable of making a will.

After the death of Mrs. Hayden the petitioner demanded of the respondent that he should execute to her a deed of the premises in question; but he refused, and has ever since refused to do so. The respondent is now in possession of the property, claiming it as his own and denying that the petitioner has any rights or interest therein.

Upon these facts the case was reserved for the advice of this court.

PARK, C. J.¹ This case is clearly one of fraud. * * *

But it is unnecessary to pursue this question of fraud, for the case otherwise is palpably one where the respondent holds the property in trust for the petitioner, whether he made the promise in good or bad faith. If A, knowing that B is about to convey certain real estate to C, which the latter has purchased of him, should say to B, "Convey

¹ Part of the opinion is omitted.

the property to me and I will convey it to C," and B should accede to the request, and convey the property to A, no one would question but that A would hold the property in trust for C. Is this case any different in principle? Mrs. Hayden was on the point of giving this property to the petitioner by the execution of a codicil to her will, which had been prepared. The respondent knowing the fact, said to her in effect, "Let me have the property by the will you have already executed and I will convey it to the petitioner." The respondent by this promise obtained the property. It would seem that no argument need be made to show that he holds it in trust.

But it is said that she did not intend to execute the codicil unless the respondent was willing that she should do so. We do not so understand the report of the committee. But grant that it was so; did he not in the plainest and most unmistakable language give her to understand that he was willing? What did she desire to have done? She wanted the petitioner to have the property. What request did she make of the respondent? She asked him if he was willing that the petitioner should have it. Whether the conveyance was to be made in one form or another was of no consequence, and formed no part of the substance of the inquiry, although he took it for granted that she intended to do it by executing the codicil that lay before her, which was in fact her intention. What reply did he make? He said that she was weak, that she need not trouble herself to sign the paper (meaning the codicil), that he would deed the property to the petitioner, and would do just as she wanted to have him; that is, I will do just what you ask my consent to have done; therefore do not trouble yourself in your weak condition to execute the codicil. If this language does not convey a consent that the petitioner should have the property, then language in any form of words would fail to express the idea.

It follows therefore that the respondent obtained the property in question by his promise to convey the same to the petitioner, and consequently we think he is bound in equity and good conscience to make the conveyance.

We advise the Superior Court to grant the prayer of the petition.

DICKERSON and Others v. MAYS.

(Supreme Court of Mississippi, 1882. 60 Miss. 388.)

Appeal from the Chancery Court of Benton County.

The bill filed in this suit on the 14th of November, 1870, by Mrs. Mary F. Mays against G. N. Dickerson, G. D. Dickerson and H. L. Machem, alleges substantially the following facts: In 1871, John H. Machem purchased of L. J. McDonald a house and lot in the town of Ashland, Benton County, which he intended for the use and benefit

of the complainant, Mary F. Mays, and her brother H. L. Machem, who were his children. J. H. Machem paid for the property and put Mary F. Mays and her brother in possession of it; but by accident or neglect no conveyance was taken from McDonald; in November, 1873, the complainant and her brother made a parol contract with G. N. Dickerson to exchange this house and lot in Ashland for a house and lot in the town of Salem, Benton County, and a tract of land in the same county. Pursuant to the contract McDonald by instructions of complainant and her brother conveyed the house and lot in Ashland by direction of G. N. Dickerson to his son G. D. Dickerson. G. N. Dickerson took possession of the Ashland property, but refused to convey to complainant and her brother the property he agreed to convey. H. L. Machem sold his interest in the property to complainant. J. H. Machem the father died in 1872.

The prayer of the bill is for "a decree divesting all right, title and interest of the said defendants in and to the said house and lot in the town of Ashland, or the property which the said Dickerson was to convey for said house and lot, out of them and each of them and vesting the same in a commissioner of the court, with full power to convey the same to your oratrix," etc. and for general relief.

H. L. Machem made no defense. The Dickersons demurred on the ground that the contract of exchange could not be enforced because not in writing. The demurrer was overruled and the defendants answered. Proof was taken and on final hearing a decree was rendered vesting the title to the Ashland property in a commissioner, with direction to convey the same to complainant, unless G. N. Dickerson should within thirty days convey to her the property which he had agreed to exchange for the Ashland property. From that decree the Dickersons appealed.

Kimbrough & McDonald, for the appellee.

In this case the fraudulent grantee should be made to hold title as trustee for benefit of injured party.

CAMPBELL, C. J., delivered the opinion of the court.

The Statute of Frauds presents no obstacle to the bill, which does not seek the enforcement of a parol agreement for the sale of land, but the cancellation of a conveyance which it is inequitable for the defendant to hold. There was no just objection to the bill, and the demurrer was rightfully overruled. The evidence supports the decree, and it is affirmed.

SECTION 3.—THE LANGUAGE NECESSARY TO THE CREATION OF A TRUST.

ALDRICH v. ALDRICH, Executor, and Others.

(Supreme Judicial Court of Massachusetts, 1898. 172 Mass. 101, 51 N. E. 449.)

Bill in equity, filed May 6, 1898, in the Superior Court, by a son of P. Emory Aldrich, to establish a trust under the will of his father.

The bill alleged that the testator died on March 14, 1895, leaving a will by which he gave "all the rest and residue of my estate, after the payment of debts," to his wife. After appointing her executrix, * * * he proceeded: "I give all my estate to my said wife to the end that she may be able to maintain a home for herself, and one where she can receive all our dear children, as we have been accustomed to do during our joint lives. I am confident she will manage with good discretion and fidelity what is committed to her, and that when she shall no longer need the property it will be equally divided among all our children, or their representatives." The widow died on December 25, 1897, leaving a will by which she provided: "After the payment of all debts and charges it is my wish so to provide that the remainder of my property may suffice if possible to maintain the house where we have so long lived happily, for those of my children who may need it, without attempting to control their disposition of it as may to them seem best." After a few small legacies, including one thousand dollars to Charles F. Aldrich, a son, who was named executor, and one thousand dollars to said Charles in trust for the plaintiff, the testatrix further provided: "All the rest, residue, and remainder of my property of every nature, I give, devise and bequeath to my three daughters * * * in equal shares, to have and to hold to them their heirs and assigns forever."

The widow died possessed of the personal property left her by her husband's will, except the income thereof, which she spent during her life. The plaintiff received during the life of the testatrix no part of the testator's property either real or personal, and the one thousand dollars left to him in trust was less than one-fifth of the property owned by her when she made her will, and at her death exclusive of what came to her by the will of her husband, and less than one-fifth of the personal property so left by him, and less than one-fifth of the real estate left by him. The prayer was that an account might be taken, and that the executor might be directed to hold the property as trustee, and to pay over to the plaintiff one-fifth of the same.

Hearing before Dewey, J., who reserved the case for the consideration of this court.¹

MORTON, J. If the testator had intended to create a trust in favor of his children at his widow's death, there can be no doubt that he knew how to do it in clear and unmistakable terms, and it is almost inconceivable that, if such was his purpose, he should have expressed himself in the manner in which he has done.

There is no doubt that words of recommendation, or of confidence, entreaty, hope, or desire, have been held sufficient under some circumstances to create a trust. But, speaking generally, this was because in such cases such a construction was supposed to carry out the intention of the testator. If an arbitrary rule seems to have been laid down at one time in regard to what would constitute a precatory trust, there can be no doubt, we think, that the tendency of later decisions has been, if not to relax the rule thus laid down, at least not to extend it. *Hess v. Singler*, 114 Mass. 56. *Lambe v. Eames*, L. R. 10 Eq. 267; S. C. 6 Ch. App. 597.

In the present case there is what clearly would constitute in law, if it stood alone, an absolute gift of the estate to the wife. Then follows, after one or two intervening clauses, the one on which the plaintiff relies. This was intended by the testator, it seems to us, to express his reason for the gift to his wife and his confidence in her, and not to cut down or affect the absolute character of the gift which he had previously made to her. It is true that he says in substance that he expects that the property, when she shall no longer need it, will be divided equally between the children and their representatives. But there is nothing which renders it obligatory on her to do this, and therefore one of the features of a precatory trust is wanting. [Cases cited.]

The cases which we have cited do not resemble in all respects the one at bar, and there are English and American cases which seem to support the view for which the plaintiff contends. But the question is, whether, taking the will as a whole, it was the intention of the testator to create a trust, and we are of opinion that it was not, and that the construction which we have adopted is in harmony with the more recent English and American cases.

Bill dismissed.

¹ Part of the statement of the case is omitted.

PHILLIPS, as Executrix, v. PHILLIPS and Others, as Executors.

(Court of Appeals of New York, 1889. 112 N. Y. 197, 19 N. E. 411, 8 Am. St. Rep. 737.)

Defendants appeal from a General Term judgment of the Supreme Court which affirmed a Special Term judgment in favor of plaintiff.

FINCH, J.¹ The will to be construed was written by the testator himself, and while extremely brief and simple, presents a problem not altogether easy of solution.

Its terms give to the testator's wife the whole of his property, real and personal, name her as executrix, and then proceed as follows: "If she find it always convenient to pay my sister Caroline Buck the sum of three hundred dollars a year, and also to give my brother, Edwin W., during his life the interest on ten thousand dollars (or seven hundred dollars per year), I wish it to be done." The widow has paid the annuity to the sister regularly, but that to the brother for a single year only. During the years succeeding, no payment was made, and this action is brought by the executrix for a construction of the will and to determine whether she is bound to make the payments withheld. It is admitted by formal stipulation that the contingency described in the will has in fact happened during the three years after 1883, and that the financial situation of the widow during the years of her refusal was such that it was entirely convenient for her to have paid the disputed allowance, and that she refused payment not on that account, but from motives of her own with which she claimed the courts have no concern, and about which they are not at liberty to inquire. The General Term has sustained her contention upon an opinion of the trial judge, very patiently and carefully prepared, and from which we depart only upon convictions that we are unable to resist.

The real intention of the testator was one of two things. He meant to make the annuities to his brother and sister dependent upon the existence of a specific fact, or upon the choice and will of his devisee. If they rest upon the former they become a gift from him; if upon the latter, they have no existence outside of the choice of the widow. * * *

One suggestion made on behalf of the appellants is, that the framing of the condition or contingency shows that the provision for the brother and sister was not meant to be dependent upon the absolute and uncontrolled choice of the wife. If that had been testator's purpose, the condition interposed was both needless and misleading. Without it she would be left to give the allowance or not as she pleased, and could suffer no inconvenience at the hands of the testator. But with it the inference is that the contingency provided for was the only one intended to excuse payment. That contingency was an

¹ Part of the opinion is omitted.

actual fact to happen or not to happen along the line of the future, and independent of the mere volition or choice of the general devisee. "If she find it always convenient" are the words. "If she find it;" that is, if experience shows it; if the facts at the time of payment prove to be such; if her financial condition as it shall then exist enables her to pay easily. The expression contemplates, not her choice or preference, but her pecuniary situation after the experience or management of one or more years, and it indicates his purpose to have been to charge the annuities upon the sweeping gift to his wife, provided, and provided only, that in her experience of the future it should turn out that the payment of those charges would occasion her no inconvenience.

"If she find it always convenient;" that is on each occasion, at the date of every payment. * * * In these words of the testator his purpose and intention, I think, is sufficiently disclosed. He did not mean to make the payment of the annuities dependent upon the mere choice or will of his wife, but upon her ability to pay them without inconvenience to herself. Given that ability, he says: "I wish it to be done." The words are not, I wish her to do it, or I hope she will feel it to be her duty, or I trust she will see the propriety of such payment to be made, but I, the testator, dealing with my own bounty to her, "I wish it to be done;" it is my wish, not hers, that I put behind the annuities. It is observable, also, that in the gift to his wife he does not add words that could seem inconsistent with a subsequent charge upon it, as, for her own use and benefit, or to her and her heirs forever, but leaves the path to a trust or a charge unobstructed so far as possible.

It is perfectly well settled that what are denominated precatory words, expressive of a wish or desire, may, in given instances, create a trust or impose a charge. * * * The primary question in every case is the intention of the testator, and whether in the use of precatory words he meant merely to advise or influence the discretion of the devisee, or himself to control or direct the disposition intended. In such a case we must look at the whole will, so far as it bears upon the inquiry, and the use of the words "I wish" or "I desire" is by no means conclusive. They serve to raise the question, but not necessarily to decide it. We are convinced that in the present case the testator meant to charge upon the gift to the wife the annuities to his sister and brother, provided, only, that their payment should not occasion her inconvenience. The legacy to the brother should be computed at \$700 per year.

The judgment should be reversed, and judgment rendered for the defendant, construing the will in accordance with this opinion.

HARDING v. GLYN.

(In Chancery, before the Master of the Rolls, Hon. John Verney, 1739. 1 Atkyns, 469.)

Nicholas Harding in 1701 made his will, and thereby gave "to Elizabeth, his wife, all his estate, leases, and interest in his house in Hatton Garden, and all the goods, furniture, and chattels therein at the time of his death, and also all his plate, linen, jewels, and other wearing-apparel, but did desire her at or before her death to give such leases, house, furniture, goods and chattels, plate and jewels, unto and amongst such of his own relations as she should think most deserving and approve of," and made his wife executrix, and died the 23d of January, 1736, without issue.

Elizabeth, his widow, made her will on the 12th of June, 1737, "and thereby gave all her estate, right, title and interest to Henry Swindell in the house in Hatton Garden, which her husband had bequeathed to her in the manner aforesaid; and after giving several legacies, bequeathed the residue of her personal estate to the defendant Glyn and two other persons, and made them executors," and soon after died, without having given at or before her death the goods in the said house, or without having disposed of any of her husband's jewels, to his relations.

The plaintiffs insisting that Elizabeth Harding had no property in the said furniture and jewels but for life, with a limited power of disposing of the same to her husband's relations, which she has not done, brought their bill in order that they might be distributed amongst his relations, according to the rule of distribution of intestates' effects.

MASTER OF THE ROLLS. The first question is, if this is vested absolutely in the wife? And the second, if it is to be considered as undisposed of, after her death, who are entitled to it?

As to the first, it is clear the wife was intended to take only beneficially during her life; there are no technical words in a will, but the manifest intent of the testator is to take place, and the words "willing" or "desiring" have been frequently construed to amount to a trust, *Eacles et ux. v. England et ux.*, 2 Vern. 466; and the only doubt arises upon the persons who are to take after her.

Where the uncertainty is such that it is impossible for the court to determine what persons are meant, it is very strong for the court to construe it only as a recommendation to the first devisee, and make it absolute as to him; but here the word "relations" is a legal description, and this is a devise to such relations, and operates as a trust in the wife, by way of power of naming and apportioning, and her non-performance of the power shall not make the devise void, but the power shall devolve on the court; and though this is not to pass by virtue of the statute of distributions, yet that is a good rule

for the court to go by. And therefore I think it ought to be divided among such of the relations of the testator Nicholas Harding, who were his next of kin at her death; and do order that so much of the said household goods in Hatton Garden, and other personal estate of the said testator Nicholas Harding, devised by his will to the said Elizabeth Harding, his wife, which she did not dispose of according to the power given her thereby, in case the same remains in specie, or the value thereof, be delivered to the next of kin of the said testator Nicholas Harding, to be divided equally amongst them, to take place from the time of the death of the said Elizabeth Harding.¹

SECTION 4.—CONSIDERATION.

Note, uses are raised either by transmutation of the estate, as by fine, feoffment, common recovery, etc. or out of the state of the owner of the land, by bargain and sale, by deed indented and enrolled, or by covenant upon lawful consideration.—Co. Lit. 271b.

It is clear, uses may be raised two ways: 1. By transmutation of the estate. 2. Without transmutation of the estate.

Those that arise by transmutation: as by fine, feoffment, recovery. Those that arise without transmutation, and that but two ways: 1. By bargain and sale. 2. By covenant to stand seized to uses.

This is to be observed in raising of uses, that they that arise by way of covenant, or bargain and sale, there must be a consideration to raise them; but they that arise by way of transmutation of possession may arise without any consideration at all.—Earle, Serjeant, arg. in *Garnish v. Wentworth*, Carter's Common Pleas Reports, 137, 143 (1666).

See Lib. 2, Doctor & Student, fol. 100. A man can [not] commence an use without bargain, livery of seisin, or recompense; for it cannot be by bare grant or covenant without recompense, where the grantor himself is seized of the land in possession; but if a man makes a feoffment in fee to the use of the feoffee and his heirs without recompense, yet the feoffee is seized to his own use; but if a man makes a feoffment to his use, so that a use be in esse, he may grant to the feoffee to be seized to his own use without recompense

¹ See comment of Lord Eldon on this case in *Brown v. Higgs*, 8 Ves. Jr. 561, 571 (1803).

and well; for there was a use in esse before. Contra where a man seized in fee to his own use, grants to another that he will be seized to his use without bargain or recompense. Note a diversity; and the same it seems of a consideration.—Brooke's Abridgment, Feoffments al Uses, pl. 46.

For as I have said, a use is nothing but a trust, which trust one can sell or give at his pleasure. For I say that there is no doubt but if I sell to you my use, now upon the sale the use is changed to you from my person; so I understand if I say to you "I give you my use of such lands to you," by those words you have the use; for the use does not pass as the land passes, for land cannot pass without livery, but a use by bare words. * * * And so by the same reason that a use can pass by words, by the same reason it can pass by devise.—Per York, Y. B. 27 Hen. VIII, fol. 8, pl. 22.

There are several ways in the law for declaring of uses, whether upon transmutation of possession, or without it. If an use be declared to be on transmutation of possession, as in a fine or feoffment, there needs no agreement whatever; it is sufficient for the party on the transmutation to declare, that the use shall be to such party, and of such an estate; but if an use arise without transmutation of possession, the use then does not arise by virtue of any declaration or appointment, but there must be some precedent obligation to oblige the party declaring the use, which must be founded on some consideration; for a use, having its foundation generally on grounds of equity, could not be relieved in chancery, without transmutation of possession, or an agreement founded on a consideration; and therefore if bargain and sale were made of a man's land on the payment of money, the use would have raised, without deed, by parol. But if the use was in consideration of blood, then it could not arise by parol agreement, without a deed; because that agreement was not an obliging agreement, it wanted a consideration; and therefore to make it an obliging agreement there was a necessity of a deed: but where there was a transmutation of possession, there needed no deed, but only the bare appointment of the party.—Per Holt, Chief Justice, *Jones v. Morley*, 12 Modern, 159 (King's Bench, 1697).

2 ROLLE'S ABRIDGMENT, 781 (F), USES, pl. 1, 2, 3.

If a feoffment be made at this day without any consideration expressed, it shall be to the use of the feoffor.

So if a man suffer a common recovery without limiting to whose

use it shall be, or expressing a consideration, it shall be to the use of the recoveror.

The law is the same of a fine.

NOTE.

(Benloe, 27, pl. 112, 1535.)

Note by all the justices and sergeants in the Common Pleas, that if a man enfeoffs another in fee of land by deed without any consideration to be held to the use of the feoffee himself as recited in the deed and yet the feoffee permit the feoffor to take the profits of the land for several years afterwards, still the feoffee shall be adjudged to have the right to said lands in fee, and not the feoffor, because the use was limited to him by the deed which was a good consideration.

STEPHENS CASE.

(In the Common Pleas, 1588. 1 Leonard, 138, pl. 188.)

In an *ejectione firmæ* the case was, that the father covenanted with one A that in consideration of a marriage to be had betwixt the son of the covenantor and the daughter of A that he before such a day would levy a fine, which fine should be to the uses of the son and daughter in tail for the jointure of the daughter. The fine is levied according to the uses aforesaid; the father dieth, but in the fine no mention is made of any marriage had; and upon that matter the court was clear of opinion, that notwithstanding that the marriage was not accomplished, yet the estate tail was well enough executed in the son and daughter, for the fine without any consideration doth carry the uses, but without a fine such a consideration would not raise such an use without accomplishment of the marriage, for the consideration executed ought to produce the use. But in this case the uses are perfected by the fine, and A upon the matter might have had covenant against the father to have the fine before the marriage.

TAYLOR v. VALE.

(In the Queen's Bench, 1589. 1 Croke, Eliz. 166.)

Replevin. The case was upon demurrer. Vale, having a rent charge in fee by indenture, which was enrolled within six months, giveth and granteth it to Hall, in fee and there was no attornment.

Nota. In truth, the case was, that he for a certain sum of money giveth, granteth, and selleth the rent, &c. But it was pleaded only, that he by indenture dedit et concessit.

And it was ruled without any argument, that the rent without attornment passeth not, being only by way of grant, and not of bargain or sale; although the deed was enrolled.—But Wray said, that if by indenture, in consideration of a certain sum of money, *dedit et concessit* and the deed is enrolled, this shall pass the rent without attornment, though there be no words of bargain and sale.—And the plaintiff had judgment.

2 ROLLE'S ABRIDGMENT, 783 (H), USES, pl. 5, 6, 7.

Consideration of ancient acquaintance, or of being chamber-fellows or entire friends, will not raise an use.

So consideration of great familiarity or long acquaintance with him, or that they were scholars together in their youth, will not raise an use.

So if A in consideration that B was bound in a recognizance for him, bargains and sells land to the other, this is not good.

ANONYMOUS.

(In the Common Pleas, 1678. 2 Ventris, 35.)

In an ejectment upon a special verdict the sole point was, whether a lease for a year, upon no other consideration than reserving a pepper-corn, if it be demanded, shall work as a bargain and sale, and so to make the lessee capable of a release.

And it was resolved that it should, and that the reservation made a sufficient consideration to raise an use, as by bargain and sale. Vide 10 Co. in Sutton's Hospital's case.

The efficacy of a bargain and sale appears never to have depended upon the amount of the consideration; and if any pecuniary consideration whatever is expressed in the deed, it is not necessary to prove actual payment, neither will the bargainor or his heirs or devisees be permitted to show that nothing was in fact paid. In the ordinary case of a bargain and sale by a lease for years, on which to found the common law conveyance of a release by the owner of the reversion, it has been held that the reservation of a pepper-corn rent, to be paid, if demanded, was sufficient to raise the use.—Walworth, Ch., in *Rogers v. Eagle Fire Ins. Company of New York*, 9 Wend. 611, 631 (1832) citing *Barker v. Keete*, Freem. Com. L. R., 250, 2 Mod. 249; s. c., 2 Vent. 35.

2 ROLLE'S ABRIDGMENT, 784 (I), USES, pl. 5, 6.

In consideration of certain money given by B. a man may covenant to stand seized to the use of A. for life, remainder to C. in fee; for here it is clear that the money was given for both estates; and though A. and C. are strangers to the gift of money, still they are sufficiently privy as if it was given for them.

So in consideration of certain money given by B. a man may covenant to stand seized to the use of B. for life, remainder to C. in fee, or with divers remainders for the money was given for all the estates.¹

SHARINGTON and PLEDALL v. STROTTON and Others.

(In the Queen's Bench, 1565. 1 Plowden, 298.)

Trespass quare clausum fregit, March 20, 1564. The defendant pleaded that the place in which the trespass was supposed to be done was part of the Manor of Bremell, in the county of Wilts, of which one Andrew Baynton was seised in his demesne as of fee; that being so seised, before the alleged trespass, an indenture was made between the said Andrew Baynton and Edward Baynton, his brother, by which, after expressing his intention that the land might continue and remain to those of the blood and name of Baynton therein named, he for said cause and for the good will, fraternal love and favor which he bore Edward his brother and his other brothers therein named, covenanted and granted that he and his heirs should thenceforth stand and be seised thereof to the use of himself for life and after his death to the use of Edward Baynton and Agnes his wife for their lives with divers remainders over. Andrew died February 21, 1564. Edward and his wife entered and claimed as legal tenants for life under said indenture and the Statute of Uses. Defendants justified the alleged trespass as servants of Edward and Agnes. Plaintiffs demurred to this plea and defendants joined in the demurrer.

And the matter was argued in Michaelmas Term, in the 7th and 8th years of Queen Eliz., by Fleetwood and Wray on the part of the plaintiffs, and by Thomas Bromley and an apprentice of the Middle Temple on the part of the defendants.

And those who argued on behalf of the plaintiffs said that the matter of the bar was insufficient, and that there was no use here made by this indenture, nor was any possession conveyed to the said Edward Baynton and Agnes by the Statute of Uses upon this covenant and agreement by the indenture. For they said, first it is to be considered that Andrew Baynton, at the time of making the inden-

¹ See, also, Same's Case, 2 Rolle's Abr. 791, Uses, pl. 2 (Exchequer, 1609)

ture, was seised of the said manor in fee simple, clear of all estates and interests of any stranger therein, and if he intended to make a stranger have a use in it, he ought to have taken one of these two ways to raise such use. The one is, to part with the possession, by the circumstances required by the common law, to the use intended, as to make a feoffment, to levy a fine, or to suffer a recovery of the land to the use intended; and this way the common law is satisfied, as well as the party also who has the use, for the circumstances of the common law are pursued, and the use is no more than a confidence annexed to the estate which the person parts with, and when he parts with the estate by his own consent, he may make it upon confidence, and this way the use is properly made. The other way is, to keep the land in his hands without parting with it, and yet to do such a thing as shall make the possession to be to the use of another, and that cannot be unless the thing done imports in itself a good and sufficient consideration to make the possession be to the use of another, which shall be upon a contract, or upon a covenant or grant on consideration. As if a man is seised of land in fee, and bargains and sells the land to another in consideration of a certain sum paid to him, or agreed to be paid at a certain day, here is a contract and the bargainor shall be seised to the use of the bargainee by the course of the common law, because he has done an act upon consideration, that is, he has bargained the land for money; and inasmuch as he hath the money, or security for it, it is reasonable that the bargainee should have something for it, and the land he cannot have as his own, because he had not livery of seisin, and therefore reason has necessarily vested the use in him, which is but a right in conscience to have the profits, and to have the land ordered according to his will; and if the bargainor will not permit him so to have it, reason vests in the bargainee a title to compel him by the Judge of conscience to do it. So is it in the case of a covenant upon consideration, as if I promise and agree with another that, if he will marry my daughter, he shall have my land from thenceforth, and he does so, there he shall have a use in my land, and I shall be seised to his use, because a thing is done whereby I have benefit; viz. the other has married my daughter, whose advancement in the world is a satisfaction and comfort to me, and therefore this is a good consideration to make him have a use in my land. So that a good consideration is always requisite to create a use *de novo* in the land of another, where there is no transmutation of the possession of the land. Then in our case here, inasmuch as Andrew Baynton was seised of the land in fee simple, and intended to raise uses in it without any transmutation of the possession, which he cannot do by the course of the common law, unless the circumstances pursued in the raising of such uses import a good and sufficient consideration to support the same, for this reason we ought to weigh the considerations here, and see what substance they have in the law. And the causes contained in

the indenture are three; first, a desire which he had that the lands might come, remain, and descend to the heirs males of his body limited in the indenture; secondly, his intent that the lands should continue and remain to such of the blood and name of Baynton as are named in the indenture; thirdly, the good will and brotherly love and favor which he bore to his brother Edward Baynton, and to his other brothers. And these are all the considerations for the matter in the rehearsal, viz. that the said Andrew had no issue male, and that he was determined and resolved how his manors and lands should remain and be as well in his lifetime as after his death, is no consideration at all, but the want of issue male is the cause that moved him to resolve, and the resolution is but a demonstration of his mind, and none of them is any consideration, for the considerations are the three before mentioned. And as to the first, viz. his desire that the lands might come to the heirs males of his body, this does not seem to be any consideration to the father, for the father has no gain or advantage by it, but the heirs males of his body. And the consideration ought to be to him that is seised of the land, for if he has no recompense there is no cause why the use of his land should pass. And none of the considerations contain a recompense here, for the continuance of the land in his blood and name of Baynton is no recompense to him, nor cause worthy to raise a use; no more is the brotherly love and favor which he bore to Edward Baynton, or to his other brothers, for although these causes induce affection, yet every affection is not a sufficient cause to alter the use. For if a man grants to J. S. that in consideration of their long acquaintance, or of their great familiarity, or of their being scholars together in their youth, or upon such like considerations, he will stand seised of his land to his use, this will not change the use, for such considerations are not looked upon in the law as worthy to raise a use, because they don't import any value or recompense. For if upon consideration that you are my familiar friend or acquaintance, or my brother, I promise to pay you £20. at such a day, you shall not have an action upon the case, or an action of debt for it, for it is but a nude and barren contract, *et ex nudo pacto non oritur actio*, and there is no sufficient cause for the payment, nor is anything done or given on the one part, for you were my brother or my acquaintance before, and so will you be afterwards; so that nothing is newly done on the one part, as is requisite in contracts, and also in covenants upon consideration. As if I sell my horse to you for money or other recompense, here is a thing given on both sides, for the one gives the horse, and the other the money, or other recompense, and therefore it is a good contract. So is it in the case of a covenant upon consideration, as if I covenant with you, that if you will marry my daughter you shall have my land, or I shall be seised to your use; here is an act on both parts, for you are to marry my daughter, and for that I grant to you the use; so that there is an act done, and a cause arising

newly on each part. But in the principal case there is no such thing, for the issue male of Andrew Baynton should have been his issue male, and his name and blood should have been his name and blood, and his brothers should have been his brothers, and fraternal love should have been between them, if this covenant or grant had not been made, so that all this was before the indenture or covenant, and should have been after the time of the indenture or covenant, if the same had not been made. Wherefore no new thing is here done or caused by the one side, and there is no cause here but what would have been if no such covenant or indenture had been made. But the common law requires that there should be a new cause, whereof the country may have intelligence or knowledge for the trial of it, if need be, so that it is necessary for the public weal. For livery of seisin was first invented as an act of notoriety, whereby people might have knowledge of estates, and be more able to try them, if they should be empanelled on a jury; and by the like reason when a use shall pass, there ought to be, by the common law, a contract, or a public and notorious consideration to a covenant, which may cause the country to have knowledge of the use for the better trial thereof, if it should be necessary. And such was the intention of the Parliament in 27 Henry VIII. when they made the Act that the possession should be where the use was, one of the great causes of making which Act was to remove ignorance, and that the country might know in whom the estate of the land was. And the like consideration they had in making the Act of Enrolments, which restrains estates of freehold from passing by bargain and sale, except it be by writing indented enrolled within six months. And if uses might be so easily raised by covenants upon such considerations as these here are, where no act or thing apparent is done whereof the country may have notice, it would destroy the effect of the said Statute of Uses, and would be pernicious to the public weal, and make it very difficult for the people to know who were the owners of lands and tenements. And it is to be presumed that the makers of the said Act of Enrolments did not take the common law to be so, for if they had they would have remedied it in this case, as well as they did in the case of a bargain and sale, which is much more notorious than a covenant upon such secret consideration, where no apparent act or thing is done to inform the country of the alteration of the estate in the land; and forasmuch as they did not add any remedy to it, it is an argument that they did not take the law to be that uses might pass upon such covenants without notorious considerations. But if the use had been in esse, it might well enough have passed to a stranger by the grant of cestui que use without any consideration; for the cestui que use may as well give or grant his use without consideration, as he may his horse or other chattel, and he may also devise it, but to create it de novo out of lands cannot be done without good consideration. And to this purpose they alleged the opinions of

Read and Tremail, two of the Justices of the King's Bench, in the case of an office traversed in 21 Henry VII. and the case there put by Read, fol. 19, was also cited, viz. it was covenanted by indenture between Sir John Mordant and his wife, and one T. that the said T. should have the land to him and to his heirs of his body, and that for default of such issue, the lands should remain to Sir John Mordant and his wife in fee, and it was adjudged that he should not have any use by force of the indenture, as it is there rehearsed by Read, but they were put to their action of covenant. So here no use shall be raised upon these considerations, for they are utterly ineffectual to such purpose, and then if no use could be raised by the common law, from thence it follows that the statute does not execute any possession here, for it executes no possession but where there was a use before; for which reason the bar is not good, but the plaintiffs shall recover. And many other things were said, and many cases put to enforce this argument, which I have omitted, my design being only to show briefly the principal reasons thereof.

On the contrary Thomas Bromley and the said Apprentice argued for the defendants.¹ The Apprentice divided the matter into two distinct points. First, whether the grant and agreement upon these considerations (admitting it had been without deed or writing) had been sufficient to raise the uses according to the agreement or not. Secondly, admitting the considerations to be insufficient if they had been without deed, or admitting that there were no considerations at all, if nevertheless the uses shall be raised here, inasmuch as the agreement thereunto is by deed.

And as to the first point, which contains the considerations, he said that the considerations are in number four, and each of them is several, and he made several points of them, and argued to them severally. The first is, the affection of the said Andrew Baynton for his heirs males which he should beget on the body of Frances Lee, and his provision in the estate made for their security accordingly. * * * The second consideration is the continuance of the land in the name of Baynton, and this seems to be a good consideration to raise a use. * * * The third consideration here is, the brotherly love, and continuance of the land in such of the blood of the said Andrew as are mentioned in the indenture, viz. his brothers. * * * The fourth consideration is the marriage had between Edward Baynton and Agnes his wife; for the use is limited after the death of Andrew to Edward Baynton and Agnes his wife, for term of their lives. * * *

Then as to the second point, admitting the considerations to be insufficient, or admitting that no considerations had been expressed, yet the covenant of itself, without consideration, is sufficient to raise the uses. And in order to understand this the better, let us see what

¹ Part of the argument for defendants herein is omitted.

advantage the party here shall have by the deed, if the deed be not sufficient to raise the uses. And it seems clearly that he shall have none. For he cannot have an action of covenant upon the deed, because there is nothing executory here; for Andrew has covenanted with Edward that he and all persons seised of the land shall from thenceforth stand and be seised to the uses limited. And if they did not stand seised, there is no default in Andrew, but in the law, for he granted that from thenceforth, viz. immediately, he would be seised, and no default can be charged in him if he did not stand seised. Nor can Edward have an action of covenant against him, for an action of covenant shall never be brought, but where it is covenanted that a thing shall be done in time to come, or that it was done in time past.

And, Sir, by the law of this land there are two ways of making contracts or agreements for lands or chattels. The one is, by words, which is the inferior method; the other is, by writing, which is the superior. And because words are oftentimes spoken by men unadvisedly and without deliberation, the law has provided that a contract by words shall not bind without consideration. As if I promise to give you £20. to make your sale *de novo*, here you shall not have an action against me for the £20., as it is affirmed in the said case in 17 Edward IV., for it is a nude pact, *et ex nudo pacto non oritur actio*. And the reason is, because it is by words which pass from men lightly and inconsiderately, but where the agreement is by deed, there is more time for deliberation. For when a man passes a thing by deed, first there is the determination of the mind to do it, and upon that he causes it to be written, which is one part of deliberation, and afterwards he puts his seal to it, which is another part of deliberation, and lastly he delivers the writing as his deed, which is the consummation of his resolution; and by the delivery of the deed from him that makes it to him to whom it is made, he gives his assent to part with the thing contained in the deed to him to whom he delivers the deed, and this delivery is as a ceremony in law, signifying fully his good will that the thing in the deed should pass from him to the other. So that there is great deliberation used in the making of deeds, for which reason they are received as a lien final to the party, and are adjudged to bind the party without examining upon what cause or consideration they were made. And therefore in the case put in 17 Edward IV. put it thus, that I by deed promise to give you £20. to make your sale *de novo*, here you shall have an action of debt upon this deed, and the consideration is not examinable, for in the deed there is a sufficient consideration, viz. the will of the party that made the deed. And so where a carpenter, by parol without writing, undertook to build a new house, and for the not doing of it the party in 11 Henry IV. brought an action of covenant against the carpenter, there it does not appear that he should have anything for building the house, and it was adjudged that the plaintiff should take nothing by his writ: but if it had been by specialty, it would have

been otherwise; and so it is there held by Thirning, *causa qua supra*. So in 45 Edward III. in debt, the plaintiff counted that a covenant was made between him and the defendant, that the plaintiff should marry the defendant's daughter, and that the defendant should be bound to him in £100., and he said that he had married his daughter; and the count was challenged, because this debt is demanded upon a contract touching matrimony, which ought to be in Court Christian; but notwithstanding this, forasmuch as he demanded a debt upon a deed, whereby it was become a lay contract, he was put to answer: but otherwise it would have been if it had been without deed, as it is there put; and 14 Edward IV. and also 17 Edward IV. are, that if it be without deed the action does not lie, because the marriage, which is the consideration, is a thing spiritual; which books are contrary to the opinion of Thorp in the said case in 22 Ass. Plow., fol. 305. So that where it is by deed, the cause or consideration is not inquirable, nor is it to be weighed, but the party ought only to answer to the deed, and if he confesses it to be his deed, he shall be bound, for every deed imports in itself a consideration, viz. the will of him that made it, and therefore where the agreement is by deed it shall never be called a *nudum pactum*. And in an action of debt upon an obligation, the consideration upon which the party made the deed is not to be inquired, for it is sufficient to say that it was his will to make the deed. And so inasmuch as in the principal case it is agreed that the uses might be raised by the deed if there had been a consideration in it, and here there is a consideration contained in the deed, viz. the will of Andrew Baynton, which is sufficient of itself, for this reason the uses shall be raised thereby; and if this should not be sufficient to raise them, yet they should have been raised by other considerations, if they had been without deed, whereas here they are by deed, and so they shall be raised a fortiori. For which reasons they prayed judgment that the plaintiffs might be barred. And many other things were said, and cases put to enforce these arguments.

And after these arguments the Court took time to deliberate until Hilary Term, and from thence until Easter Term, and from thence until this present Trinity Term, in the eighth year of the reign of the present Queen, and the defendants now prayed judgment. And Corbet, Justice, said that he and all his companions had resolved that judgment should be given against the plaintiffs. For it seemed to them that the considerations of the continuance of the land in the name and blood, and of brotherly love, were sufficient to raise the uses limited. But, he said, as my Lord Chief Justice is not now present, you must move it again when he is present, and you shall have judgment. And afterwards, at another day, Catline, Chief Justice, being present, the Apprentice prayed judgment. And Catline and the Court were agreed that judgment should be entered against the plaintiffs, and he ordered Haywood, the Prothonotary, to enter it. And the Apprentice said, may it please your Lordship

to show us, for our learning, the causes of your judgment. And Catline said, it seems to us that the affection of the said Andrew for the provision of the heirs males which he should beget, and his desire that the land should continue in the blood and name of Baynton, and the brotherly love which he bore to his brothers, are sufficient considerations to raise the uses in the land. And where you said in your argument *naturæ vis maxima*, I say *natura bis maxima*, and it is the greatest consideration that can be to raise a use. But as to the other consideration moved in the argument, viz. of the marriage had between Edward Baynton and Agnes, the record does not prove this, nor is it so averred, and it shall not be so intended, and therefore I don't regard it, but the other causes and considerations are effectual, and those which moved us to our judgment. Wherefore judgment was given for the defendants.

CALLARD v. CALLARD.

(In the Queen's Bench and Exchequer Chamber, 1593. Moore, 687, pl. 950.)

In *ejectione firmæ* upon a demise by Eustace Callard. And upon not guilty pleaded it was found by special verdict that Thomas Callard was seized in fee, and in consideration of the marriage of Eustace, his son and heir apparent, being upon the land spoke these words to the said Eustace, viz.: "Eustace stand forth, I do here, reserving an estate for mine own and my wife's life, give unto thee and thine heirs forever, those my lands and Barton of Southcot." And afterwards Thomas enfeoffed Richard the defendant, his younger son, in fee, with warranty and died. Eustace entered and made a demise to the plaintiff who entered, and the defendant ejected him. Upon which special verdict, after long debate in the Queen's Bench judgment was given for the plaintiff, upon which the defendant brought a writ of error in the Exchequer Chamber, and here the judgment was reversed at Hilary Term in the year 39 Eliz. Note that in the Queen's Bench, Popham, C. J., held strongly that the consideration of blood raised a use to Eustace without writing, and so he had the possession by 27 Hen. VIII. But Gawdy, Fenner and Clench contra to this opinion, yet in the final judgment they agreed, because they took the words to amount to a feoffment with livery being upon the land, and the use to be to the feoffor and his wife for life, and then to Eustace and his heirs. But note that in the Exchequer Chamber, Ewen took the law in the same manner as the puisne justices in the Queen's Bench, and that the judgment ought to be affirmed for this reason. But he was against Popham that the use would not arise without writing. Beamont took it as a feoffment to Eustace in fee and the reservation to the father and his wife void for repugnancy; and therefore wished to have the judg-

ment affirmed; and he also was against Popham. But all the other Justices, viz., Anderson, Pyrryam, Clerk, Walmesley and Owen all agreed, that there was no feoffment executed, because the intent was repugnant to the law, that is, to pass an estate to Eustace reserving a particular estate to himself and his wife. And a use it could not be because the purpose was not to raise a use without an estate executed, but by an estate executed which could not take effect. And they all agreed that if it was a use yet it could not arise upon natural affection without a deed. Note that the witnesses that proved the words to the jury were attainted of perjury in the Star Chamber, at Easter Term, 40 Eliz.

FRAMPTON v. GERRARD.

(In the Queen's Bench, 1601. 2 Rolle's Abridgment, 785 (K), Uses, pl. 4; 791, pl. 1.)

PER CURIAM. If a man covenant in consideration of blood and of the marriage of his bastard daughter to stand seized to the use of the bastard daughter: this is not a good consideration to raise a use, for in law she is not his daughter, but filia populi.

If a man levies a fine of certain land and covenants by indenture in consideration of the marriage of his bastard daughter that the conusee shall stand seized to the use of the daughter, though that is not a good consideration to raise an use by way of covenant, yet it is sufficient upon a fine, for the will of the party is sufficient for this without consideration.

2 ROLLE'S ABRIDGMENT, (I), USES, pl. 5.

If a man in consideration that B. will marry his daughter covenants to stand seized to the use of B. and his daughter, remainder to C., this is a void remainder to C, because he is a stranger to the consideration.¹

¹ See, also, *Fox v. Wilcocks*, 2 Rolle's Abr. 783 (H), Uses, pl. 4.

The cestui que trust is not a stranger to the consideration, if (1) nearly related by blood to the covenantor, e. g. a son or grandson, *Bonde v. Edmunds*, 2 Rolle's Abr. 782, 783 (H), Uses, pl. 3; 2 Rolle's Abr. 784 (I), Uses, pl. 3, 4; 2 Rolle's Abr. 785 (K), Uses, pl. 6, 8; *Cross v. Faustenditch*, Cro. Jac. 180; a daughter, 2 Rolle's Abr. 784 (I), Uses, pl. 2, 5; brother of covenantor, *Sharlington v. Strotton*, Plowd. 298; nephew, *Englefield's Case*, 7 Co. R. 116; or if (2) connected by marriage with the covenantor, e. g. wife of covenantor, *Bedell's Case*, 7 Co. R. 40a; *Burgoine v. Burgoine*, 22 Vin. Abr. (N), Uses, pl. 10; Co. Lit. 112a; wife of covenantor's son, *Anon.* 13 Co. R. 48; *Corbyn v. Corbyn*, 2 Rolle's Abr. 784 (I), Uses, pl. 4; *Bould v. Winston*, 2 Rolle's Abr. 784 (I), Uses, pl. 3; husband of covenantor's daughter, 2 Rolle's Abr. 784 (I), Uses, pl. 2; wife of covenantor's brother, 2 Rolle's Abr. 783 (I), Uses, pl. 1.

The cestui que trust need not be the covenantee. *Cross v. Faustenditch*, Cro. Jac. 180; *Bedell's Case*, 7 Co. R. 41a; *Harpur's Case*, 11 Co. R. 246; *Buckler v. Symons*, 2 Rolle's Abr. 788, Uses.

If the cestui que trust be the covenantor's wife, she cannot be the cove-

THE STATUTE OF USES, 27 HEN. VIII, c. 10 (1535).

This statute enacts that where any person or persons stand or be seized or at any time hereafter shall happen to be seized, of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders or other hereditaments, to the use, confidence or trust of any other person or persons or of any body politick by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will or otherwise, by any manner means whatsoever it be: that in every such case, all and every such person and persons, and bodies politick, that have or hereafter shall have any such use, confidence or trust, in fee-simple fee-tail, for term of life or for years, or otherwise, or any use, confidence or trust in remainder or reverter, shall from henceforth stand and be seized, deemed and adjudged in lawful seizin, estate and possession of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders and hereditaments, with their appurtenances, to all intents, constructions and purposes in the law, of and in such like estates as they had or shall have in use, trust or confidence of or in the same; and that the estate, title, right and possession that was in such person or persons that were, or hereafter shall be seized of any lands, tenements or hereditaments, to the use, confidence or trust of any such person or persons, or of any body politick, be from henceforth clearly deemed and adjudged to be in him or them that have, or hereafter shall have, such use, confidence or trust, after such quality, manner, form and condition as they had before, in or to the use, confidence or trust, that was in them.

STATUTE OF INROLLMENTS, 27 HEN. VIII, c. 16.

Enacts that from July 31, 1536, no manors, lands, tenements or other hereditaments shall pass, alter or change from one to another, whereby any estate of inheritance or freehold shall be made or take effect in any person or persons, or any use thereof to be made, by reason only of any bargain and sale thereof, except the same bargain and sale be made by writing, indented, sealed, and inrolled in one of the King's courts of record at Westminster etc. * * * the same inrollment to be had and made within six months next after the date of the same writings indented.

In St. 27 Hen. VIII, c. 10, all the conveyances are mentioned, not one word of a consideration in the whole statute, that is left to the judgment of the law; therefore the law hath construed that statute

nantee. A husband and wife at common law were one, and therefore the husband could not covenant with himself. Co. Lit. 112a.

according to the rules of the common law for considerations; for at common law, that passeth by transmutation of possession, it is so since, and what before the statute could not pass without valuable consideration, so it is since, and not directed by any statute. Plowd. Comment. fol. 301, Sharington's Case. Good consideration is requisite to create a novel use, where there is no transmutation of possession. The reason why such constructions are made, may be because such conveyances by transmutation of possession are done more solemnly and publicly, as in Plowd. 302. Boynton's Case. Therefore the Statute of Inrollments was made, that men might know the owners and the tenants to the Præcipe. And the law hath allowed consideration of natural affection and marriage sufficient to raise an use, Dyer fol. 336b. Bee and Carlton's Case, 11 Rep. fol. 76b, tells you what a consideration is, it is a meritorious cause requiring a mutual recompense in fact or in law; in Boynton's Case cited before, acquaintance and great familiarity are not sufficient to raise an use. In every promise which gives any cause of action, there must be a consideration, that must be either beneficial to him that made the promise, or prejudicial to him that brings the action. My Lord Bacon in his reading upon the Statute of Uses, hath a good observation, though Uses are accounted light, yet they are ponderous, and nothing but a good consideration can raise them up. There are no considerations now at this day to raise uses upon covenants, but natural love and affection which is for advancement of blood, or consideration of marriage, which is the joining of blood and marriage together; other considerations, as money for land, or land for land, though the words be [stand seized to uses] yet they are Bargains and Sales, and without enrollment they raise no use. As you may see in 1 Leonard 201, at the end of my Lord Paget's Case, Coke's Comment. upon the Statute of Enrollments, p. 672 Plowd. Comment. 303, and in many other books.—Per Brome, Serjeant, arg. Carter's Common Pleas Reports, 137, 138–139.

The second word material is the word "seized"; this excludes chattels.—Lord Bacon, Statute of Uses, 43 (Rowe's Ed.).

Neither the Statute of Uses, nor the 10th section of the Statute of Frauds, embrace personal property.—Dunkin, Ch., in *Rice v. Burnett*, 1 Speer's Eq. 579, 588, 42 Am. Dec. 336 (1844).¹

¹ See, also, *Watson, Trustee, v. Pitts*, 2 McMul. 298 (1842).

JENKINS CENTURY CASES, 244, CASE XXX, 1580.

An husband possessed of a lease for years, assigns it to B in trust for himself and his wife; the husband cannot assign this trust, for a trust is nothing in law; and uses being abolished and joined to the possessions, this trust cannot be said to be an use; for if so, the 27 H. 8 of transferring uses into possession, would be to no purpose; for this statute requires a seisin to the use, but there is only a possession in a lessee for years. Assignments of trusts beget strife and maintenance, and are void in law.

By the judges of both Benches.

NEVIL, v. SAUNDERS.

(In Chancery, before Lord Chancellor Jeffreys, 1686. 1 Vernon, Ch. 415.)

Lands were given by will to trustees and their heirs, in trust for Anne the defendant's wife and her heirs, and that the trustees should from time to time pay and dispose of the rents and profits to the said Anne, or to such person or persons as she by any writing under her hand, as well during coverture as being sole, should order or appoint the same, without the intermeddling of her husband, whom he willed should have no benefit or disposal thereof; and as to the inheritance of the premises in trust for such person or persons, and for such use and estates, as the said Anne by any writing purporting her will, or other writing under her hand, should appoint; and for want of such appointment, in trust for her and her heirs.

The question was, whether this was an use executed by the statute, or a bare trust for the wife: and the court held it to be a trust only, and not an use executed by the statute.

BROOKE'S ABRIDGMENT, FEOFFMENT AL USES, pl. 40, 1532.

A man makes a feoffment in fee to four to his use, and the feoffees make a gift in tail to a stranger without consideration who has no notice of the first use to hold to the use of the cestui que use and his heirs, the tenant in tail shall not be seized to the first use, but to his own use, for the statute of West. 2, c. 1, directs that voluntas donatoris in omnibus observetur, that a man should refer his will to the law and not the law to his will, and so here there is tenure between the donor and the donee, which is a consideration that the tenant in tail shall be seized to his own use, and the same law of tenant for

term of years and for term of life, there fealty is due and where a rent is reserved, there though a use be expressed to the use of the donor or lessor, yet this is a consideration that the donee or lessee shall have it to his own use; and the same law where a man sells his land for £20. by indenture, and executes an estate to his own use; this is a void limitation of the use, for the law, by the consideration of money, makes the land to remain in the vendee.

TYRREL'S CASE.

(In the Court of Wards, 1557. 2 Dyer, 155a, pl. 20.)

Jane Tyrrel, widow, for the sum of four hundred pounds paid by G. Tyrrel her son and heir apparent, by indenture enrolled in chancery in the 4th year of Edw. VI, bargained, sold, gave, granted, covenanted, and concluded to the said G. Tyrrel all her manors, lands, tenements, etc. to have and to hold the said etc. to the said G. T. and his heirs forever, to the use of the said Jane during her life, without impeachment of waste; and immediately after her decease to the use of the said G. T. and the heirs of his body lawfully begotten; and in default of such issue, to the use of the heirs of the said Jane forever. Quære well whether the limitation of those uses upon the habendum are not void and impertinent, because an use cannot be springing, drawn, or reserved out of an use, as appears *prima facie*? And here it ought to be first an use transferred to the vendee before that any freehold or inheritance in the land can be vested in him by the enrollment, etc. And this case has been doubted in the Common Pleas before now: *ideo quære legem*. But all the judges of C. B. and Saunders, Chief Justice, thought that the limitation of uses above is void, etc. for suppose the Statute of Inrollments [cap. 16] had never been made, but only the Statute of Uses [cap. 10], in 27 Hen. VIII, then the case above could not be, because an use cannot be ingendered of an use, etc.

The reason why the use to Jane Tyrrel was void is thus stated by Anderson in 1 And. 37, pl. 96: "For the bargain for money implies in it a use, and the limitation of the other use is merely contrary, for by this means the use in fee which is in the bargainee in fee alone will be destroyed if the law were not as before [the statute]."

In *Dillam v. Frain*, 1 And. 309, 313, Anderson, citing Tyrrel's Case, says: "This limitation of the use is utterly void because by the sale for money the use appears and to limit another (though the other use appear by deed) is merely repugnant and they cannot stand together." He refers to Brooke's *Abr. Feoffments al Uses*, 40.¹

¹ See, also, Anderson in *Crumwel v. Andros*, 2 And. 69, 81.

SAMBACH v. DALSTON.

(In Chancery, 1634. Tothill, 189.)

Because one use cannot be raised out of another, yet ordered, and the defendant ordered to pass according to the intent.

ASH v. GALLEN.

(In Chancery, before Lord Keeper Bridgman and Justice Windham, 1668. 1 Chancery Cases, 114.)

It was declared, that a use upon a use will not rise by bargain and sale. Dyer, 155, and Chudleigh's Case, 1 Co. Rep. 283.

But for the plaintiff it was insisted, that though a use could not rise as a use upon a use, yet as a trust it would in equity.

A case was ordered to be made, but the parties agreed among themselves, and it was not argued at all.

DIXON v. HARRISON.

(In Common Pleas, 1669. Vaughan's Reports, 36, 50.)

VAUGHAN, Ch. J. The intent of the Statute of 27 Hen. VIII, c. 10, which was to bring together the possession and the use, when the use was to one or more persons, and the possession in one or more other separate persons, was soon after the statute¹ wholly declined, upon what good construction or reference I know not.

For now the use (by the name of trust) which were one and the same before the statute, remains separately in some persons, and the possession separately in others, as it did before the statute, and are not brought together but by decree in chancery, or the voluntary conveyance of the possessor of the land, to cestui que trust.

SYMSON v. TURNER.

(In Chancery, 1700. 1 Equity Cases Abridged, 383.)

But notwithstanding this statute [St. 27 Hen. VIII, c. 10] there are three ways of creating an use or a trust, which still remains as at common law, and is a creature of the court of equity, and subject only

¹ Dean Ames in an article, "The Origin of Uses and Trusts," 21 Harvard Law Review, 261, has traced the evolution of the use upon a use into the modern trust, and has shown that the Statute of Uses "so far accomplished its purpose that for a century there was no such thing as the separate existence in any form of the equitable use in land."

to their control and direction: 1st, Where a man seized in fee raises a term for years, and limits it in trust for A. etc., for this the statute cannot execute, the termor not being seized. 2dly, Where lands are limited to the use of A. in trust to permit B. to receive the rents and profits; for the statute can only execute the first use. 3dly, Where lands are limited to trustees to receive and pay over the rents and profits to such and such persons; for here the lands must remain in them to answer these purposes; and these points were agreed to.

DAW v. NEWBOROUGH.

(In Common Pleas, 1715. Comyns, 242, pl. 135.)

KING, Ch. J. And when the estate is limited to Thomas and his heirs, to the use of, etc., the use must of necessity arise out of the estate of the feoffee, etc. to the use, etc. and therefore, if it be to the use of Thomas and his heirs, and after to the use others, this will be an use upon an use which will never be allowed by the rules of law; for the use is only a liberty or authority to take the profits, but two cannot severally take the profits of the same land, therefore there cannot be an use upon an use.

But this is now allowed by way of trust in a court of equity.

It was agreed that a devise might be to the use of another.—1 Leon. 253 (1591). Burchett v. Durdant, 2 Ventris, 311, 312 (1691) acc.¹

Ex parte PYE.

Ex parte DUBOST.

(In Chancery, before Lord Chancellor Eldon, 1811. 18 Ves. Jr. 140.)

William Mowbray, by his will dated the 10th of April, 1806, gave to Marie Genevieve Garos the sum of £2,500 sterling for her own use over which her husband was to have no power.

The testator died on the 8th of June, 1809. His widow became a lunatic; the petitioner, Pye, was the committee under the commission, and, upon her death, took out administration to her, and administration de bonis non to the testator.

¹ Though the statute of wills (St. 32 Hen. viii, c. 1) was not passed till 1540, five years after the statute of uses, it has been held that the latter statute applies to a devise of land to a use and that the statute may transfer the legal title to the cestui que use. See Sugden on Powers (7th Ed.) star pages 171-173.

The Master's report stated that, by a letter written by the testator to Christopher Dubost, in Paris, on the 25th of November 1807, the testator authorized him to purchase in France an annuity of £100 for the benefit of the said Marie Genevieve Garos for her life, and to draw on him for £1,500 on account of such purchase; and under that authority Dubost purchased an annuity of that value; but that, as she was married at the time, and also deranged, the annuity was purchased in the name of the testator; and the testator sent to Dubost, by his desire, a power of attorney, authorizing him to transfer to Marie Genevieve Garos the said annuity, dated the 10th of June, 1808.

The report further found, upon the affidavit of Dubost and the copy of the deed, that the first intimation he received of the death of the testator, who died in June, 1809, was in November, 1809; and that, in ignorance of such death, Dubost, on the 21st of October, 1809, exercised the power vested in him, by executing to Marie Genevieve Garos, her late husband being then dead, and she of sound mind, a deed of gift of the said annuity; and the Master found that, by the law of France, if an attorney be ignorant of the death of the party who has given the power of attorney, whatever he has done while ignorant of such death is valid. The Master, therefore, stated his opinion that the annuity was no part of the personal estate of William Mowbray.

The first¹ petition prayed that so much of the report as certifies the French annuity to be no part of the testator's personal estate may be set aside; and that it may be declared that the said annuity is part of his personal estate.

Sir Arthur Piggott, Mr. Richards, Mr. Wingfield, Mr. Horne, and Mr. Wear, for different parties, in support of the first petition. The French annuity being purchased in the testator's name, and no third person interposed as a trustee, the interest could not be transferred from him without certain acts, which were not done at the time of his death. It was therefore competent to him, during his life, to change his purpose, and to make some other provision for this lady by funds in this country; conceiving, perhaps, that she might return here. The authority given to purchase this annuity could not have been enforced against him during his life by a person claiming as a volunteer; nor can it be established against his estate after his death, the act which would have given the benefit of it against the personal representative not having been completed. Where a question is to be decided by a foreign law, the first step is an inquiry by the Master to ascertain what is the law of that country.

Sir Samuel Romilly and Mr. Bell, contra.

THE LORD CHANCELLOR. The other question involves not only the construction of the French law, and the point whether that has

¹ Only so much of the case is given as relates to the first petition.

been sufficiently investigated, but farther, whether the power of attorney amounts here to a declaration of trust. It is clear that this court will not assist a volunteer; yet, if the act is completed, though voluntary, the court will act upon it. It has been decided that, upon an agreement to transfer stock, this court will not interpose; but if the party had declared himself to be the trustee of that stock, it becomes the property of the cestui que trust without more; and the court will act upon it.

June 13th. THE LORD CHANCELLOR. These petitions call for the decision of points of more importance and difficulty than I should wish to decide in this way, if the case was not pressed upon the court. With regard to the French annuity, the Master has stated his opinion as to the French law, perhaps without sufficient authority, or sufficient inquiry into the effect of it, as applicable to the precise circumstances of this case; but it is not necessary to pursue that, as upon the documents before me it does appear that though in one sense this may be represented as the testator's personal estate, yet he has committed to writing what seems to me a sufficient declaration that he held this part of the estate in trust for the annuitant.

Under his judgment, the order was pronounced dismissing the first petition.

WHEATLEY v. PURR.

(In Chancery, before the Master of the Rolls, Lord Langdale, 1837. 1 Keen, 551.)

September 1, 1835, Harriet Oliver made her will and named the defendant Purr as executor. July 1, 1833 she deposited with her bankers, Oakes & Co., £2000. This sum was entered in the books of the bankers to the account of Harriet Oliver as trustee for John Richardson Wheatley, Mary Wheatley and Harriet Wheatley, and the following promissory note was given by them for it:

"Sudbury Bank, July 1st, 1833. Fourteen days after sight I promise to pay Mrs. Harriet Oliver, trustee for John Richardson Wheatley, Mary Wheatley and Harriet Wheatley, or order, two thousand pounds, with interest at $2\frac{1}{2}$ per cent. For Oakes, Brown, Moore & Hanbury. [Signed] Daniel Hanbury."

A receipt for this promissory note was signed by Mrs. Oliver, and given to the bankers.

Harriet Oliver died January 7, 1834, possessed of said promissory note. Her will was proved by James Purr. He received payment of the £2000. and interest from Oakes & Co. and invested the same in 3 per cent. consols.

This bill was filed by the infant plaintiffs, by John Wheatley their father and next friend, and prayed a declaration that Harriet Oliver was a trustee of the £2000. and interest for plaintiffs, and that

such sum and interest be paid to the Accountant General in trust for the benefit of plaintiffs or the stock in which the same had been invested transferred into his name.

THE MASTER OF THE ROLLS. The question is, whether in the acts done by Mrs. Oliver, for the purpose of constituting herself a trustee for the benefit of Mrs. Wheatley's infant children, anything was wanting to accomplish her purpose. I am of opinion that she did constitute herself a trustee for the infant children, and that a trust was completely declared so as to give to the plaintiffs a title to the relief which they claim. Upon the death of Mrs. Oliver, the bankers were called upon to pay the money by her executor, who had undoubtedly a right to claim it, in his character of legal personal representative, upon whom, if Mrs. Oliver was a trustee, the trust devolved. The executor received the money, as part of the general assets of the testator. Those assets it was his duty to defend against the claim of the plaintiffs, until their right should be ascertained, and he has acted very properly, therefore, in refusing to part with the fund, without the authority of this Court.¹

CROSS v. SPRIGG.

(In Chancery, before Vice Chancellor Sir James Wigram, 1849. 6 Hare, 552.)

A suit for the administration of the estate of the testator, Thomas Cross. A reference was directed to inquire whether the defendant John Gilbert was liable to pay any part of the £1000 appearing, by the report, to be due from him, as surety for William Gilbert, and, if so, to certify the amount due for principal and interest. The Master found that the testator lent William Gilbert £1000 upon his bond, dated the 3d of December, 1838, for the purpose of establishing him in business, in partnership with another person; that John Gilbert and one West were sureties in the bond, each for £333. 6s. 8d. and interest, with a condition that no proceedings should be taken

¹ "Even if it were a declaration of trust, it would be invalid for want of consideration. Mere declaration of trust by the owner of property, in favor of a volunteer, is inoperative, and this court will not interfere in such a case. The case is different where there has been a change of legal ownership, and so a trust has been constituted; and then the court will inquire what the trusts are. But there is no authority in favor of the defendant's contention."—Lord Chancellor Cranworth, in *Scales v. Maude*, 6 De G., Macn. & G. 43, 51 (1855).

When the chancellor's attention was called to this dictum ten years later in *Jones v. Locke*, L. R. 1 Ch. App. Cas. 25, 28, he said that the dictum attributed to him in *Scales v. Maude* must have had reference to the special circumstances of the case, and, though he considered the decision in that case to be right, the dictum was clearly wrong as a general statement of the law; that there could be no doubt that there might be a valid declaration of trust in favor of a volunteer.

The validity of a voluntary declaration of trust, made after the analogy of a covenant to stand seised, is now almost universally recognized.

to enforce payment against John Gilbert and West, until three months' notice should have been given to them, their executors, etc.; that in September, 1840, William Gilbert and his partner dissolved their partnership, and their creditors agreed to accept a composition of 11s. in the pound on their debts; that the testator agreed to become surety for the payment of such composition, and agreed with William Gilbert to relinquish and give up the bond debt, and all interest that had accrued thereon, and promised him to deliver up the bond to be cancelled, but did not do so, because, as he told William Gilbert, he could not find such bond; that the testator never applied for the payment of the principal or interest on the bond, and a short time before his death he gave William Gilbert £60. and told him that such sum and all other monies which he had received from him (the testator), and had not repaid, were to be considered as gifts. And the Master found, that, under the circumstances aforesaid, the defendant John Gilbert was not liable to pay any part of the said £1000. and interest.

Several exceptions were taken to this report.

VICE CHANCELLOR. The question raised by the exceptions in this case was, whether William Gilbert, the obligor in a bond for £1000., was liable for the amount of such bond to the defendant Harriet Clara Sprigg, the widow and administratrix of Cross, the obligee in the bond and the testator in the cause; and this general question resolved itself into two—first, whether the testator's declarations justified the conclusion, that he had abandoned all intention of recovering upon the bond, and intended that the obligor should no longer be liable upon it; and, secondly, if that were answered in the affirmative, what were the consequences in respect to the liability of the obligor?

Assuming the first question to be answered in the affirmative, I had no hesitation in holding, at the close of the argument, that the debt remained at law, and to that opinion I adhere. I was also of opinion, that, if the debt remained at law, it must remain in equity unless some special grounds were laid for a different conclusion; and I was of opinion, that a mere intention on the part of the testator, which he might at any time have changed, not to sue upon the bond, would not give such an equity. But, as the case of *Flower v. Marten* [2 Myl. & Cr. 459] appeared to have escaped the recollection of counsel, I requested that the exceptions might be spoken to, by one counsel on a side, with reference to some of the principles which the Lord Chancellor laid down in that case, and upon which the cases there referred to were decided. This was accordingly done, and I have now to state the grounds upon which I have come to the conclusion, that the obligor, having, in this case, no defense at law, has none in equity.

In *Wekett v. Raby* [2 Bro. P. C. 386, Toml. Ed.], Raby was indebted to the testator; Mr. Piggott, on a bond for securing £335. 5s. Mr. Piggott made his will, and appointed the appellant, Mary, his

executrix and residuary legatee, and died about two years afterwards. In his last sickness, and a few days only before his death, he said to the appellant, Mary, "I have Raby's bond, which I keep; I don't deliver it up, for I may live to want it more than he; but when I die, he shall have it; he shall not be asked or troubled for it." After the death of the testator, Raby asked Mary to make him a present of the bond, but did not pretend to have any right to it; her answer was "You may be easy—it is safe in my hands;" she afterwards added, "If I marry, I will deliver the bond to you the night before." Mary having afterwards put the bond in suit, Lord Macclesfield, upon Raby's bill, ordered the bond to be cancelled, and the House of Lords confirmed that decree. The circumstances of that case bring it within the principle examined by the Vice Chancellor in *Padmore v. Gunning* [7 Sim. 644], and to that principle the decision in *Wekett v. Raby* is referred by the Lord Chancellor in the case of *Byrn v. Godfrey*. It would have been a fraud in the residuary legatee to enforce the bond. The decision did not proceed upon the ground of release.

Richards v. Syms [2 Eq. Ca. Ab. 617] decided that a creditor, whose debt was secured by a bond and mortgage, released the debt by delivering up the bond and mortgage with the declared intention of releasing the debt; but that, I apprehend, was considered by Lord Hardwicke as a legal and not merely as an equitable discharge, and; moreover, was a different thing from the mere declaration of intention to forgive a debt. Lord Hardwicke seemed, at first, to be of opinion, that it was an equity which could only be enforced if the creditor was plaintiff; but he afterwards said it was otherwise, for that the law was with the debtor.

In *Aston v. Pye* [5 Ves. 350, n.], cited in a note on *Eden v. Smyth*, and commented upon by the Lord Chancellor, in *Byrn v. Godfrey*, and in *Eden v. Smyth*, the following entry was made in the books of the testator, the payee of a note: "Pye pays no interest, nor shall I ever take the principal, unless greatly distressed." The testator died. The case came before Lord Kenyon, at the Rolls, upon the question, whether the debt was subsisting, and Lord Kenyon sent the parties to law. It does not appear that Lord Kenyon, or Lord Loughborough noticing this case, thought that the maker of the note could have any equity, if the law was against him, as it was held to be.

Byrn v. Godfrey [4 Ves. 6] is the next case. In that case the testator held a promissory note for £200. He frequently told his executor that he never meant to call for payment of the note, and made a statement to that effect the day before his death. Lord Loughborough said, that the case relied upon was not a release, so that he could say that the debt was gone by the act of the party to whom the money was due; nor was it a legacy; and the bill was dismissed, so far as it prayed that the note might be cancelled. In that case Lord Loughborough referred to *Wekett v. Raby* and *Aston v. Pye*, and the case

of *Richards v. Symes* before Lord Hardwicke to which I have already referred.

The next case is *Eden v. Smyth* [5 Ves. 341]. In that case the question was, whether a legatee was entitled to his legacy discharged of a debt he owed testator. Letters and declarations of the testator were given in evidence, and also accounts of the testator, and memoranda in his handwriting; and, upon the evidence, the court held, that the debt was discharged. The judge who decided this case was the same who decided *Byrn v. Godfrey*, which was cited; and it is not to be assumed, that he intended, in *Eden v. Smyth*, to act upon a different principle from that upon which he decided *Byrn v. Godfrey*. In *Eden v. Smyth* the Lord Chancellor did that which, perhaps, would be considered questionable at this day; he entered into an inquiry, what the testator, at the time of making his will, considered or intended to consider his fortune as consisting of, as distinguished from what it actually consisted of. But it is unnecessary to rely upon this, for it is manifest that Lord Loughborough's judgment did not proceed upon any distinction between legal and equitable discharges of a debt. His judgment was, that the debt was gone at law.

Reeves v. Brymer [6 Ves. 516] is a most important case. Nothing could be more explicit or certain than the intention of the obligee to discharge the obligor. Lord Alvanley thought it a hard case and desired to find the means of having the obligor discharged. But he would do nothing, except give the parties leave to proceed at law. *Eden v. Smyth* and *Aston v. Pye* were cited, and Lord Alvanley's observations show that he considered *Eden v. Smyth* as proceeding upon the same grounds as I have.

Gilbert v. Wetherell [2 S. & S. 254] is not a very clear case. It was a transaction between father and son. The father had lent the son £10,000 and took his promissory note for it; an account was afterwards settled between them, by which it appeared, that more than £9,000. was due upon the note. Further transactions took place, by which it was said the son became further indebted to his father. The father, shortly before his death, burned the promissory note in the presence of a witness, saying at the time, "Now Thomas owes me £11,000." Sir John Leech said, that the circumstances under which the note had been destroyed amounted to an equitable release of the debt, but that the sum of £9,000 and upwards, which remained due by the account stated, must be considered as an advancement. None of the preceding cases were cited; and this is, I believe, the first case in which the principle is laid down, (if it be there laid down,) that voluntary transactions on the part of an obligee, which at law are inoperative, create an equity in favor of the debtor to be discharged from his debt. But the case cannot be an authority for any abstract proposition; for Sir John Leech held, that the transaction converted

the debt into an advancement. It is impossible to treat the case as not depending upon the relation between the obligor and the obligee.

The only case which has made me doubt my conclusion is that of *Flower v. Marten* [2 My. & Cr. 459] which contains language on the part of the Lord Chancellor, expressive, it is said, of his opinion, that where a creditor by his conduct shows an intention to abandon his rights as a creditor, and treat the debt as a gift to the debtor, equity will not permit the debt to be enforced. If I understood the case as deciding any such abstract proposition, I should unhesitatingly follow it, but I do not understand that such is the effect of the judgment.

The cases which the Lord Chancellor adverts to as governing his decision, are *Wekett v. Raby* and *Eden v. Smyth*, which certainly establish no such abstract proposition; and the judgment of the Lord Chancellor throughout, by a pointed reference to the peculiar circumstances attending the creation of the debt, and the relation in which the debtor and creditor stood to each other, shows that he did not found his judgment upon any such proposition. The case before me is the case of a creditor declaring (not to his debtor) his intention not to sue upon a bond; for I have no evidence of the alleged erasure of the bond in the testator's books, and I do not propose to make that erasure the subject of inquiry, as it would not alter my opinion if it were proved; and if the case rested here, I should hold that the debtor remained liable on his bond.

But it was said, that the defendant Harriet Clara Sprigg admits that she heard the testator say, that the bond was not to be enforced, and that she, as residuary legatee for life, is within the principle of *Wekett v. Raby*. The utmost extent to which that observation would carry the case is this, that Harriet Clara Sprigg could not during her life claim the interest of the bond; but that is not the question I have now to decide.

The ground on which I proceed is, that, if in this case obligor has no defense at law, he has none in equity. The legal question may be tried by an action, if he desires it.¹

¹ The holder of an obligation may make a gift of the same to the obligor, in whole or in part, by extinguishing the obligation in whole or in part. The extinguishment may in the case of any obligation be effected by the delivery to the obligor of a release under seal. *Stearns v. Tappin*, 5 Duer (N. Y.) 294 (1856); *Waln v. Waln*, 58 N. J. L. 640, 34 Atl. 1068 (1896).

If the obligation be a specialty, the extinguishment may be effected in several other ways: (1) By delivering the instrument to the obligor. *Slade v. Mutrie*, 156 Mass. 19, 30 N. E. 168 (1892); *Stewart v. Hidden*, 13 Min. 43 (Gil. 29) (1868); *Vanderbeck v. Vanderbeck*, 30 N. J. Eq., 265, 270 (1878) *Ellsworth v. Fogg*, 35 Vt. 355 (1862); *Larkin v. Hardenbrook*, 90 N. Y. 333, 43 Am. Rep. 176 (1882). (2) By physically destroying the instrument. *Bank of U. S. v. Sill*, 5 Conn. 106, 111 (1823). (3) By a cancellation of the instrument. *Yglesias v. River Plate Bank*, L. R. 3 C. P. D. 60 (1877).

JEFFERYS v. JEFFERYS.

(In Chancery, before Lord Chancellor Cottenham, 1841. Craig & Phillips, 138.)

John Jefferys executed certain indentures of lease and release of the 16th and 17th of September, 1834, whereby, in consideration of the natural love and affection which he had for his daughters, and for divers other good considerations, he conveyed certain freehold hereditaments, and covenanted to surrender certain copyhold hereditaments, to Bowden and Thorn, upon trust, after his death to sell the same and after paying from the proceeds certain encumbrances to stand possessed of the residue of such moneys upon certain trusts for his daughters.

John Jefferys never surrendered the copyholds, and died in 1836 leaving a will by which he gave a part of the above mentioned freehold and copyhold estates to his wife, Isabella, who, shortly after his death, was admitted to part of the copyhold estates.

In July, 1837, his daughters filed this bill against their mother and trustees praying that the trust be carried into execution and that the mother be decreed to surrender the copyholds to which she had been admitted to the trustees.

THE LORD CHANCELLOR. The title of the plaintiffs to the freehold is complete; and they may have a decree for carrying the settlement into effect so far as the freeholds are concerned. With respect to the copyholds, I have no doubt that the court will not execute a voluntary contract; and my impression is, that the principle of the court to withhold its assistance from a volunteer applies equally, whether he seeks to have the benefit of a contract, a covenant, or a settlement. As, however, the decision in *Ellis v. Nimmo* [Lloyd & G. Rep. T. Sugd. 333] is entitled to the highest consideration, I will not dispose of this case absolutely, without looking at a former case, in which I had occasion to refer to that decision. Unless I alter the opinion I have expressed, the bill must be dismissed with costs, so far as the copyholds are concerned.

On this day his lordship said he had looked at the case alluded to, and that he saw no reason for altering the opinion he had before expressed.

ELLISON v. ELLISON.

(In Chancery, before Lord Chancellor Eldon, 1802. 6 Ves. Jr. 656.)

A lease of certain collieries for 31 years was made to Charles Wren and others. By indenture dated July 1, 1791, it was declared that Wren should stand possessed of the lease in trust as to one moiety for Ellison.

By an indenture dated June 18, 1796, Ellison assigned his interest in said collieries and the stock, etc. to Wren in trust for Ellison for

life and after his death upon other trusts. This indenture contained a power to revoke the trusts so created.

By an indenture dated July 3, 1797, Wren assigned to Ellison one undivided moiety of all the said collieries demised to him, with a like share of the stock.

Ellison by will dated June 22, 1796, gave all the residue of his personal estate to his wife and Wren upon certain trusts and appointed them his executors.

Ellison died in 1798, leaving a wife and ten children him surviving; one of which Charles E. died in 1799, an infant. Wren also died in 1799. The bill was filed by the testator's widow and Margaret Clavering, one of the cestuis que trust in the deed of June 18, 1796, praying that the trusts of that deed might be established and new trustees appointed.

The younger children by their answer submitted, whether the trusts of that deed were not varied or revoked by the indenture of July 3, 1797, from Wren to Ellison.

Mr. Steele and Mr. W. Agar for the younger children. The subsequent deed is an implied revocation. What use could there be in that deed but to give Ellison the absolute estate; which is quite inconsistent with the trusts of the former deed; which are very special, and give a large discretion? An instrument may be revoked by another, though not taking notice of the former, but only making a disposition inconsistent with it. * * * There is no instance, in which a voluntary deed, defective, and not effectual at law, has been aided in this Court; and though this is in some respects in favor of a wife and children, one of the parties claiming under it is a volunteer; and it is opposed by nine out of ten children. This deed, like that in *Coleman v. Sarrel* [1 Ves. Jr. 50], cannot be proceeded upon at law. But, if the trust was originally well created, yet if the subject gets back, and is vested in the author of the trust, the objection lies.

LORD CHANCELLOR [ELDON].¹ I had no doubt, that from the moment of executing the first deed, supposing it not to have been for a wife and children, but for pure volunteers, those volunteers might have filed a bill in equity on the ground of their interests in that instrument; making the trustees and the author of the deed parties. I take the distinction to be, that if you want the assistance of the Court to constitute you cestui que trust, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you cestui que trust; as upon a covenant to transfer stock, etc., if it rests in covenant, and is purely voluntary, this Court will not execute that voluntary covenant: but if the party has completely transferred stock, etc. though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this Court. That distinction was clearly taken in *Coleman v. Sarrel*, independent of the

¹ Part of the argument of counsel, as also of the opinion, is omitted.

vicious consideration. I stated the objection, that the deed was voluntary: and the Lord Chancellor went with me so far as to consider it a good objection to executing what remained in covenant. But if the actual transfer is made, that constitutes the relation between trustee and cestui que trust, though voluntary, and without good or meritorious consideration; and it is clear in that case, that if the stock had been actually transferred, unless the transfer was affected by the turpitude of the consideration, the Court would have executed it against the trustees and the author of the trust.

In this case therefore the person claiming under the settlement might maintain a suit, notwithstanding any objection made to it, as being voluntary. * * *

But it was put for the defendant thus; that though the instrument would have been executed originally, if the subject got back by accident into the author of the trust, and was vested in him, then the objection will lie in the same manner, as if the instrument was voluntary. I doubt that for many reasons: the trust being once well created; and whether it would apply at all, where the trust was originally well created; and did not rest merely in engagement to create it. Suppose, Wren had died; and had made Ellison his executor: it would be extraordinary to hold, that though an execution would be decreed against him as executor, yet, happening to be also author of the trust, therefore an end was to be put to the interest of the cestui que trust. * * * I think, therefore, upon the whole, this trust does remain notwithstanding this re-assignment of the legal estate to Ellison. * * *

Upon the whole therefore this relief must be granted; though I agree, that, if it rested in covenant, the personal representative might have put them to their legal remedies, he cannot, where the character of trust attached upon the estate, while in Wren; which character of trust therefore should adhere to the estate in Ellison.

VOYLE v. HUGHES.

(In Chancery, before Vice Chancellor Sir John Stuart, 1854. 2 Smale & Giffard, 18.)

THE VICE CHANCELLOR.¹ The question in this case is as to the validity of a voluntary assignment by deed, duly executed, of a reversionary interest in a sum of money in the public funds, standing in the names of the trustees of the settlement under which the assignor was entitled. According to the decision in the case of *Meek v. Kettlewell* [1 Hare, 464; s. c., on appeal, 1 Ph. 342], as affirmed on appeal, this instrument is to be treated, not as an assignment but

¹ Part of the opinion is omitted.

as a mere agreement; and being voluntary, and without any valuable consideration to support it, it confers no right on the seeming assignee to which this Court can give effect. The soundness of the doctrine which treats a deed of assignment, complete in form, as a mere agreement, although it in terms assigns and transfers an equitable reversionary interest in personal property, and which denies to it in this Court, if voluntary, any effect as a transfer of the right to property, has been much questioned. If that doctrine is to prevail, it deprives the owners of reversionary personal property of the right of alienation by one legitimate mode. As abridging the right of alienation, it materially lessens the value to its owners of the enormous and increasing amount of reversionary personal property. Fortunately, in the recent case of *Kekewich v. Manning* [1 De G., Mac. & G. 176], a more liberal and enlightened view of the law upon this subject was taken. In the present case, the question arises in a simple form. Under the trusts of the marriage settlement of 1820 the sum of £3900. 3 per cent. Consolidated Bank Annuities was vested in the names of trustees (of whom the defendant Tooke is the survivor), upon trust, after the death of Admiral Noble, and in case his wife should die in his lifetime without issue, and without appointing the fund (all of which events happened) for her next of kin, according to the statute of distributions, and as if she had died unmarried and intestate. In 1840 Mrs. Noble died, so that upon her death her next of kin had a vested interest, subject only to the life estate of Admiral Noble, who died in 1851. After Mrs. Noble's death in 1840, Mrs. Kürner, one of her next of kin, having thus a vested interest in one-fifth of the fund, subject only to Admiral Noble's life estate, executed the deed of assignment under which the plaintiffs claim. The assignment is by deed dated the 8th day of November, 1840. It recites the title of Mrs. Kürner under the settlement, and is in form an absolute assignment by Mrs. Kürner of her one-fifth of the trust fund to Caroline Sarah Noble, and gave her a power of attorney to receive it from the trustees. The deed contains a covenant for further assurance and quiet enjoyment. The consideration expressed in the deed is natural love and affection; but, as Caroline Sarah Noble was a daughter of the admiral by a former marriage, there was no relationship in blood to Mrs. Kürner; the assignment, therefore, is purely voluntary. Mrs. Kürner, the assignor, herself transmitted the deed to Mr. Tooke, the trustee, who gave a copy of it to Miss Noble. It has been argued, that, as this assignment is purely voluntary, it is a mere agreement, without any consideration to support it; that it is imperfect as a gift; imperfect, too, as a declaration of trust, and must wholly fail. Each of these three objections assumes an imperfection in the assignment, which is unfounded in fact; it is not an agreement, it is an absolute assignment by deed, purporting to transfer the estate or interest of the assignor to the assignee. As between them the transaction is complete; notice was given to the

trustee, and that notice completed the transaction as to third parties; it established the right of the assignee on any question of priority, and protected her against any fraudulent receipt by the assignor. All this carries the transaction beyond mere agreement.

Nevertheless, Lord Hardwicke and other Judges have said that the assignment of reversionary personal property, for valuable consideration, "operates by way of agreement or contract, amounting, in the consideration of the Court, to this, that one agrees with the other to transfer and make good that right or interest." To treat an actual assignment by deed as a mere agreement, was a device resorted to in the earlier efforts to get rid of the legal doctrine, "that no possibility, right, title nor thing in action shall be granted or assigned to strangers."

The progress of law as a science, keeping pace, although not uniformly, with the advancement of civilization and wealth, has sanctioned modes of alienation and enjoyment of property, both real and personal, which were prohibited by the common law. During the successive steps of this progress, strange anomalies occasionally prevailed. Contingent and executory interests in chattels or personal estate were allowed to pass by testamentary disposition before contingent inheritable interests in land. It is only by modern decisions that the same power of testamentary disposition, before allowed to chattels personal, was extended to inheritable contingent interests and possibilities. That a valid voluntary disposition of contingent and executory or reversionary interests and possibilities might be made by will, but not by deed, was an anomaly which could not long be tolerated. Even before assignments of reversionary interests, possibilities and expectancies of personal property were supported on the ground of agreements or by force only of a valuable consideration; more than one great Judge of this Court had endeavored to get rid of the strict rule of law.

Lord Chancellor Cowper, in the case of *Thomas v. Freeman* [2 Vern. 563], says: "It is a notion that has obtained at law, that a possibility is not assignable, but no reason for it if *res integra*; but the law is not so unreasonable but to allow that it may be released." And that same Judge, soon after, in *Crouch v. Martin* [Id. 595], held that a chose in action is assignable in equity upon a consideration paid. In the case of *Lord Carteret v. Paschal* [3 P. Wms. 197] it was carried further, for it was said to be admitted on all sides, that, if a man in his own right be entitled to a bond or other chose in action, he may assign it without any consideration. But this view was not constantly adhered to; and there are several subsequent cases in which a valuable consideration was held necessary to support an assignment of mere personal property. Even after the decisions in *Sloane v. Cadogan* [Sugd. Vend. & Pur. App. 24] by Sir W. Grant, and *Fortescue v. Barnett* [3 My. & K. 36] by Sir John Leach, it was held by Sir James Wigram and Lord Lyndhurst, in the case of

Meek v. Kettlewell [1 Hare, 464; S. C. 1 Ph. 342], that the want of valuable consideration to support the assignment made it ineffectual in equity. The more recent decision, in the case of *Kekewich v. Manning*, in which the authorities were reviewed, and in which the assignment was held to be valid, notwithstanding the want of valuable consideration, is sufficiently supported by authority, and rests on a sound and intelligible principle. The argument which treats the deed of assignment as a mere agreement or executory instrument, rests on this, that the property is not transferable at law. But if that be a reason for treating the deed not as an actual conveyance, which it purports to be, why should it not as well apply to all conveyances of equitable interests in real or personal estate, which are not transferrable or conusable at law?

The deed of assignment being a perfect instrument, there is no room for the argument against its effectiveness founded on the doctrine that an incomplete gift is invalid in equity. In the case of *Antrobus v. Smith* [12 Ves. 39], and *Edwards v. Jones* [1 My. & Cr. 226], there was no deed of assignment, no completeness in the transaction. In *Antrobus v. Smith* the prayer of the bill was, that a proper deed of assignment might be executed.

As to treating an assignment by deed as a declaration of trust, or refusing to it any operation because it cannot be properly treated as a declaration of trust, there seems no legitimate ground for such an argument. If a deed of actual assignment of an equitable interest has any operation in equity as divesting the assignor of his equitable right, it is an operation no more in the nature of declaring a trust than any other actual conveyance of any equitable estate or interest in real or personal property. Therefore, there seems no other just view of this case than that which treats the instrument as an actual deed of assignment, and not as a mere agreement or executory instrument. And, if in the case of an assignment of an equitable reversionary interest in personalty for valuable consideration, the assignment, being by deed, transfers the property from the assignor to the assignee, and is not a mere agreement, the actual assignment by deed of the same kind of property, without any valuable consideration, is not a mere agreement, and is not merely executory, but is an actual transfer of an equitable right. This puts it beyond the infirmity of an incomplete gift, or the case of a right resting merely in contract, which requires a valuable consideration to induce a Court of Equity to interfere. * * *

Upon the whole, my opinion is, that, by force of the deed of assignment, the equitable right was transferred by Mrs. Kürner to Miss Noble; that the transaction was completed by Mrs. Kürner's execution of the deed, and that no valuable consideration was necessary to support the assignment. The plaintiffs, therefore, are entitled to a decree for the transfer of the fund.

CLOUGH v. CLOUGH.

(Supreme Court of Massachusetts, 1875. 117 Mass. 83.)

Contract for money had and received. Trial in the Superior Court, before Aldrich, J., who allowed a bill of exceptions substantially as follows:

The plaintiff is the widow of Charles H. Clough and administratrix of his estate; he left a minor son, a mother, one sister and several brothers, including the defendant. The defendant admitted that he had received from the intestate \$400 as a *donatio causa mortis*; that intestate, during his last sickness and a few days before his death gave and delivered to him the \$400 in trust for his minor son, with instructions to invest and hold the same till the son should be twenty-one and then to pay the same with all accumulations to the son; but should the son die before twenty-one to pay the same in equal parts to intestate's mother and only sister; that he accepted the trust, took the money and retained it till after decedent's death and then deposited it in a savings bank, in his own name, as trustee for the minor son, where the money has ever since remained.

Plaintiff requested the court to charge "that if they found that the deceased directed the defendant in case he died to keep the money and give it to the child if he lived to be twenty-one years of age, and, if he did not, to divide it between the mother and sister of the deceased, that would not be in law a gift to the child, mother or sister; and that such a disposition could only be made by will."

The judge declined this request and told the jury that personal property might be so given and delivered to one in trust for another for a particular purpose, that it would be good as a *donatio causa mortis*; and that in the present case if the jury should find, upon the evidence, that the intestate, in contemplation of impending death, did give and deliver to the defendant the \$400 in trust to be paid over as contended by the defendant, and that the defendant accepted the trust and at the same time received the money and retained it in his possession until the death of his brother a few days after this transaction, and then deposited the money as he had testified, that would constitute a valid *donatio causa mortis*, and vest the property in the defendant as such trustee; and that if they so found, it would be their duty to return a verdict for the defendant upon this part of the case. The jury found for the defendant, and to the instructions and refusal to instruct the plaintiff alleged exceptions.

GRAY, C. J. Upon the facts which must have been found by the jury under the instructions of the court, the legal title in the subject of the gift vested in the donee, subject to no condition or contingency but the death of the donor. The fact that the donee took it for third persons upon a trust, the terms and limitations of which were prescribed by the donor and might vary according to subsequent events,

did not affect the validity of the gift as a *donatio mortis causa*. *Hills v. Hills*, 8 M. & W. 401. *Sessions v. Moseley*, 4 Cush 87. *Borne-man v. Sidlinger*, 15 Maine, 429, 33 Am. Dec. 626, and 21 Maine, 185. *Dresser v. Dresser*, 46 Maine, 48. 1 Story Eq. Jur. (11th Ed.) § 607e.

Exceptions overruled.¹

WALKER, Guardian, v. CREWS.

(Supreme Court of Alabama, 1882. 73 Ala. 412.)

Appeal from Barbour Chancery Court.

On March 12, 1867, Arthur Crews executed a deed of gift to his infant daughter, Ella Corine Crews, purporting by its terms to "give, grant and convey" to her certain designated promissory notes, made by divers third parties for money loaned, payable to him in January and February, 1868. Arthur Crews died January 31, 1872. A son, John E. Crews, was appointed administrator and as such distributed the estate.

This bill was filed January 15, 1880, by David L. Walker, as guardian for Ella Corine Crews, against the said John E. Crews and the other heirs and distributees of the estate to recover the amount of the notes so given which had been collected and the proceeds of which had been distributed. The bill was dismissed by the Chancellor at the hearing.

STONE, J.² The title to personal property given by deed is transferred by a delivery of the deed, without a delivery of the property. When the deed is delivered, the gift is irrevocable, and the subsequent possession of the donor does not impair its validity. * * *

It is contended for appellee that the gift in the present case is executory, and that the decree of the chancellor must be affirmed on the authority of *Borum v. King*, 37 Ala. 606. So far as the note of \$475 on Wm. B. Borum mentioned in that case, is concerned, it is difficult to draw a distinction between the provisions of the two deeds, which can benefit the complainant in this case. If there be a difference, it is in favor of the grandchild Borum under the deed of Mr. King. That deed contains words of present, absolute gift and conveyance, with a superadded provision, appointing the donor's son, Harvey King, his (donor's) special agent, and guardian of his said grandchild (donee), to manage and control the beforementioned sum of money to the best advantage of said grandson; and authorized the

¹ A gift *causa mortis* of real estate cannot be made. *Reeves v. Howard*, 118 Iowa, 121, 129, 91 N. W. 896 (1902); *Wentworth v. Shibbes*, 89 Maine, 167, 36 Atl. 108 (1896); *Gilmore, Admx. v. Whitesides, Adm'r, Dudley* (S. C.) Eq. 14, 18, 31 Am. Dec. 563 (1837); *Johnson v. Colley*, 101 Va. 414, 416, 44 S. E. 721, 99 Am. St. Rep. 884 (1903); *Meach v. Meach*, 24 Vt. 591, 595 (1852).

² Part of the opinion is omitted.

said Harvey, if he thought proper, to expend the interest in clothing and educating the grandson. There was a disposition of the money over, in the event the grandchild died without lawful issue. This court ruled, that, in as much as the legal title to the note—the right to sue in the grantee's name—was not conveyed, the gift was not perfected, and the donee could not maintain an action for its recovery.

It was said in *Connor v. Trawick*, 37 Ala. 289, 79 Am. Dec. 58, that a gift by deed delivered is an executed gift, without the actual delivery of the thing given. The delivery of the deed is the equivalent of the manual delivery of the subject of the gift. Such is the acknowledged rule. 3 Wait's Ac. & Def. 499. The gift in *Borum v. King* was by deed delivered, the symbol and equivalent of the actual delivery of the note. Under the ruling in that case the title and right to the note would not have passed, if the note itself had been delivered, without indorsement to Borum, the donee. We apprehend this lays down too technical a rule. The true sense of the principle is, that dominion over the thing shall be parted with, and not that the technical right to maintain an action in the name of the donee shall be conferred. What will amount to delivery, so as to perfect a gift, is not always one and the same thing. Much depends on the quality and condition of the thing given. The delivery should be as complete as the circumstances will reasonably permit; nothing more.

* * * If we adhere to the ruling in *Borum v. King*, we affirm, not only that an absolute parting with dominion is necessary to perfect a gift, but, when the subject of the gift is a promissory note or similar security, to make it valuable and binding, the donor must go further and guaranty the payment of the note by his indorsement, unless he have presence of mind to limit the effect of his indorsement. In *Jones v. Deyer*, 16 Ala. 221, this court said: "A voluntary gift may be made inter vivos of a promissory note payable to the order of the donor, by delivery merely, without endorsement or other writing." *Grover v. Grover*, 24 Pick. (Mass.) 261, 35 Am. Dec. 319, and *Elam v. Keen*, 4 Leigh (Va.) 333, 26 Am. Dec. 322, support this doctrine. * * * As to the promissory note given by Mr. King to his grandson, Borum, we think this court fell into an error, and to that extent that case is overruled.

[The decree of the Chancellor was reversed and a decree rendered declaring complainant entitled to relief.]³

³ The principal case is one of an absolute gift and not of a gift in trust; but the requisites of an absolute gift and of a gift in trust are the same.

See note at end of this section.

STONE v. HACKETT, Executor, and Others.

(Supreme Judicial Court of Massachusetts, 1858. 12 Gray, 227.)

Bill in equity, in the nature of a bill of interpleader, to obtain the instructions of the court in the disposition of shares of stock held by the plaintiff under a written declaration of trust.

About December 1, 1853, Dr. Kittredge, having previously purchased the stock and taken certificates thereof in the name of Harriet P. Kittredge, or Harriet Kittredge, trustee (who had previously signed a similar declaration of trusts, and afterwards died) sent the certificates of stock, with blank transfers indorsed upon them and signed by Harriet P. Kittredge, to the plaintiff, with a declaration of trust, which he requested her to sign and return it to him, and she did so. The plaintiff never paid any consideration for the shares, and the dividends thereon were paid to Dr. Kittredge during his life.

Dr. Kittredge died in February, 1854, domiciled in New Hampshire. Dr. Kittredge's widow waived the provision made for her in her husband's will and claimed her statutory share, namely dower and one third of all his estate after payment of debts and expenses.

After Dr. Kittredge's death and before filing this bill, plaintiff filled up, as of December 1, 1853, the blank transfers indorsed on the backs of the certificates of stock and demanded new certificates; but the corporations declined to issue them.

Dr. Kittredge's widow, one of the defendants, answered that the stock enumerated in the declaration of trust was never transferred or delivered to plaintiff, and that such transfer, if made, was testamentary in nature, designed to avoid the effect of the laws of New Hampshire, and, as to her, fraudulent and void.

BIGELOW, J.¹ The key to the solution of the question raised in this case is to be found in the equitable principle, now well established and uniformly acted on by courts of chancery, that a voluntary gift or conveyance of property in trust, when fully completed and executed, will be regarded as valid, and its provisions will be enforced and carried into effect against all persons except creditors or bona fide purchasers without notice. It is certainly true that a court of equity will lend no assistance towards perfecting a voluntary contract or agreement for the creation of a trust, nor regard it as binding so long as it remains executory. But it is equally true that if such an agreement or contract be executed by a conveyance of property in trust, so that nothing remains to be done by the grantor or donor to complete the transfer of title, the relation of trustee and cestui que trust is deemed to be established, and the equitable rights and interests arising out of the conveyance, though made without consideration, will be enforced in equity. [Cases cited.]

¹ Part of the opinion is omitted.

The application of the principle established by these authorities is entirely decisive of the rights and duties of the parties to this suit. The conveyance or transfer of the shares to the plaintiff in her capacity as trustee was full and complete and vested in her the legal title to the property. No further act was to be done by the original owner of the shares to consummate the plaintiff's title. As between the parties, the delivery of the certificates of stock, with the assignments of some of them, and the power of attorney to transfer the others, was equivalent to a complete transfer of the shares. Nor is it at all material to the validity of the plaintiff's title, that transfers of the shares had not been recorded in the books of the different corporations and new certificates of stock taken out by her. That was not necessary to the conveyance of the legal title as between the donor and the plaintiff. This is well settled by the authorities in this state. * * * There was then a legal transfer of the property, fully executed to the plaintiff. There was also a full and explicit declaration of trust, executed by her and delivered to the grantee, by which she accepted the gift and took on herself the execution of the trusts which he intended to establish. Nothing therefore was left in fieri. The transaction was a completely executed transfer of property, and fully created a trust, which, according to the principle already cited, a court of equity is bound to recognize and enforce.

It was suggested by the learned counsel for the widow that the donor never parted with his power or dominion over the property, because he retained a right to annul or revoke the trust. But this seems to us quite immaterial. A power of revocation is perfectly consistent with the creation of a valid trust. It does not in any degree affect the legal title to the property. That passes to the donee and remains vested for the purposes of the trust, notwithstanding the existence of a right to revoke it. If this right is never exercised according to the terms in which it is reserved, as in the case at bar, until after the death of the donor, it can have no effect on the validity of the trusts or the rights of the trustee to hold the property.²

PEARSON v. AMICABLE ASSURANCE OFFICE and Others.

(In Chancery, before the Master of the Rolls, Sir John Romilly. 1859. 27 Beavan, 229.)

On June 19, 1828, the defendant, the Amicable Society, issued to George Townsend a policy of insurance on his life for £3000. September 15, 1828, he by deed assigned the policy to two trustees upon certain trusts for his father, mother, brothers and sisters. The deed contained the usual irrevocable power of attorney and a covenant for

² See note at end of this section.

further assurance. Townsend died in 1857. The trustees claimed the amount of the policy. The executors resisted this claim, and notified the company not to pay the trustees. The trustees brought this suit against the Society and the executors, praying a declaration that the plaintiffs were entitled to the moneys payable on the policy and to apply it on the trusts of the deed of 1828.

The assurance company paid the amount into court and were dismissed before the hearing but without prejudice to any question.

Mr. Selwyn and Mr. Hardy for the plaintiffs. The case is governed by *Fortescue v. Barnett* [3 Myl. & K. 36], which is precisely in point. If this be not a perfect voluntary settlement of the policy it would be impossible to make one, however meritorious might be the object.

Mr. R. Palmer, Mr. Speed and Mr. Fischer for the defendants. It is now settled, by a series of authorities, that this court will not assist a volunteer under a voluntary settlement to perfect the gift. Either the gift is perfect or it is not. In the former case the plaintiffs have no right to come into equity; by taking that step they show that the settlement is not perfect, and that the aid of this court is required to make it effectual.

THE MASTER OF THE ROLLS.¹ No person can state too strongly to command my assent the proposition, that if a voluntary assignment of any property is imperfect and incomplete, and the assistance of a court of equity is required to give effect to it, this court will not interfere to perfect the instrument.

I also fully admit, that in these cases there is a distinction between that species of instrument which, by assignment, passes the property, and that which simply operates as a declaration of trust, and I agree that this is not a declaration of trust. The question is, whether this is a complete instrument, or whether it requires the assistance of a court of equity for its enforcement? I am of opinion that it is a complete and perfect instrument, and I will state why I think so.

If this were an assignment of the policy for value, and the purchaser had come to this court for its assistance to render the assignment more complete what would remain to be done? The assignor would say: "What can I do more than I have already done? If you had told me, out of court, what further assurance or what further deed or assignment to make this instrument more complete I would have executed it." The question, whether anything remains to be done to complete the assignment of a policy, is exactly the same, whether it arises upon a voluntary instrument or upon one for valuable consideration: whether it be one or the other, the question must be, what is there that the assignee can require the assignor to do to make the instrument more complete. The error in the argu-

¹ Part of the opinion is omitted.

ment of the defendants is this: It is assumed that this is a suit in which an assignee has come here to ask the aid of the court in making this instrument more complete; but he does nothing of the sort. It is said by the defendants, "if the plaintiffs do not require the assistance of this court, why do they not proceed at law;" but the proceeding suggested in this case would be against the executors; this is not a suit against the executors, it is a suit against the insurance company. * * *

The plaintiffs say our instrument is perfect and complete, we do not ask for any relief against the executors, why should we not have the money? The insurance office is right in paying it to us; it is for the executors to make out their claim. The question is, whether the executors can make out any claim. If the assignment had been made for value, it is clear that the assignor could not have prevented the assignee from using his name in suing the insurance company, if they had resisted the demand, and this court could not, and would not, have allowed the assignor to say his name should not be made use of. The executors can stand in no better situation than the assignor; this court would not have prevented the assignee from making use of the name of the assignor, if the insurance company had resisted payment. But here the power of attorney is voluntary; it is irrevocable and in the form usual in all these instruments, and this court will not allow the grantor to contradict his deed. The court will not assist a volunteer, but it does not say, on the other hand, that it will assist an assignor in defeating his voluntary deed. The argument has been founded on the supposition that by this suit the trustees are asking the assistance of a court of equity; but in truth they come here only to resist the executors of the assignor, who have raised a claim which the assignor was not himself entitled to raise, and which they, standing in his shoes, are not entitled to raise, but which nevertheless makes it impossible for the plaintiff to receive the money until the claim of the executors is disposed of.

Decree for the plaintiffs with costs.²

EDWARDS v. JONES.

(In Chancery, before Vice Chancellor Sir Lancelot Shadwell, 1835. 7 Simons' Reports, 325.)

The bill which was filed on the 30th of May, 1833, stated that John Nathaniel Williams, late of Castle Hill, in the County of Cardigan, executed and gave to Mary Custance a bond, dated the 27th of September, 1819, for securing the repayment, with interest, of £300. lent to him by Mary Custance and that he executed and gave to her another bond, dated the 27th day of December, 1828, for securing

² See note at end of this section.

the payment, with interest, of £123. 15s., which had become due for arrears of interest on the former bond; that Mary Custance was aunt to and had a great affection for the plaintiff; and, at different times, had expressed an intention to give or leave to the plaintiff the money due on the bonds; that the bonds were fastened together by a pin, and that Mary Custance, on the 25th of May, 1830, being a few days before her death and during her last illness, signed a memorandum on the back of the first bond, to the following effect: "I Mary Custance, of the Town of Aberyswith in the County of Cardigan, widow, do hereby assign and transfer the within bond or obligation, and all my right, title and interest thereto, unto and to the use of my niece, Esther Edwards of Llanilar in the said County of Cardigan, widow, with full power and authority for the said Esther Edwards to sue for and recover the amount thereof and all interest now due or hereafter to become due thereon; as witness my hand this 25th May, 1830;" that Mary Custance, immediately after signing the same, caused the bonds to be delivered to the plaintiff, intending that the plaintiff should be entitled thereto and to the moneys secured thereby in case of and after her death, and expressed herself to that effect; that Mary Custance died on the 30th of May, 1830, having made her will, dated the 30th of May, 1829, which did not mention the bonds or dispose of the residue of her property; and she thereby appointed the defendant her executor; that the testatrix's personal estate was more than sufficient to pay her debts and legacies; that the bonds and the money due thereon, were well given to the plaintiff by the testatrix, either as a gift, or as a *donatio mortis causa*; that the defendant had prevailed upon Williams to give him a new bond for the money secured by the two former bonds, and had given Williams a bond of indemnity; that Williams died in January, 1832, having appointed his wife, Sarah Elizabeth Williams, his executrix; and, in April, 1833, she paid the amount due on the new bond to the defendant.

The bill prayed for a declaration that the plaintiff was entitled to the principal and interest due on the two first bonds and that the defendant was a trustee thereof for her, and that the defendant might be decreed to pay to the plaintiff what he had received from Sarah Elizabeth Williams.

THE VICE CHANCELLOR. In this case the plaintiff seeks relief with respect to a gift, or, as she calls it, a *donatio mortis causa* of two bonds. If the case made by this bill were a case of mere gift, this court, clearly, would not interfere; for the delivery of a bond, by the obligee, to a third person, would give the bond to that third person, as against the obligee; yet it would not confer on the donee an absolute right to recover upon the bond. I take it to be perfectly plain that, if the obligee in a bond delivers it to a stranger, and, afterwards, thinks proper to release the obligor, the debt will be destroyed. I admit that if the obligee gives the bond to a stranger,

and the stranger chooses to destroy it, the debt will be destroyed; for the obligee meant to give, to the stranger, the same dominion over the bond that he himself had; and, as his own destruction of the bond would be the destruction of the debt, so the destruction by the donee, would, equally, destroy the debt. Again, if, after the bond has been delivered, the obligor thinks proper to pay the amount of it to the obligee, the donee cannot file a bill or support an action against the donor for the amount of the money so paid. The effect, therefore, of the gift of the bond, is to leave the donee at liberty to do just so much as the mere having possession of the bond would enable him to do, that is, he cannot sustain a bill in equity against the representative of the obligee for the purpose of recovering the amount; and, therefore, if the plaintiff rested her claim upon the gift only, this court would not interfere on her behalf.

[The Vice Chancellor then concluded that no *donatio mortis causa* was proved and dismissed the bill.] ¹

WADD v. HAZELTON and Others, as Executors.

(Court of Appeals of New York, 1893. 137 N. Y. 215, 33 N. E. 143, 21 L. R. A. 693, 33 Am. St. Rep. 707.)

Defendants appeal from a General Term judgment of the Supreme Court which affirmed a judgment for plaintiff, entered on the report of referee.

This action was commenced to procure a judgment directing the defendants to surrender to the plaintiff a certain bond and mortgage for \$2,000, which plaintiff alleged belonged to her. She claimed title by virtue of an assignment from the then owner of the bond and mortgage, one Albert Hill, executed a short time prior to his death. This assignment, though signed by Albert Hill, was never delivered.

PECKHAM, J.² Whether the plaintiff claims the bond and mortgage by virtue of an absolute gift to her from the testator, evidenced by the assignment, or whether she claims through the assignment as a declaration of trust, is somewhat difficult to determine from her complaint. The referee has taken the latter position and has found that the testator constituted himself a trustee by reason of his execution and retention of the assignment. We think there is no foundation in the evidence for the claim of an absolute gift.

There is no proof of a delivery or of any executed intention to make a gift, and the papers themselves are found among those of the testator at the time of his decease. * * *

We are also of the opinion that no trust was proved.

¹ Affirmed by Lord Chancellor Cottingham in 1 Myl. & Cr. 226 (1836). See note at end of this section.

² Part of the opinion is omitted.

While it is true that no particular form of words is necessary to create a trust of this nature, and while it may be created by parol or in writing, and may be implied from the acts or words of the person creating it, yet it is also true that there must be evidence of such acts done or words used on the part of the creator of the alleged trust, that the intention to create it arises as a necessary inference therefrom and is unequivocal; the implication arising from the evidence must be that the person holds the property as trustee for another. The acts must be of that character which will admit of no other interpretation than that such legal rights as the settlor retains are held by him as trustee for the donee; the settlor must either transfer the property to a trustee or declare that he holds it himself in trust. An intention to give, evidenced by a writing, may be most satisfactorily established and yet the intended gift may fail because no delivery is proved. And where an intention to give absolutely is evidenced by a writing which fails because of its nondelivery, the court will not and cannot give effect to an intended absolute gift by construing it to be a declaration of trust and valid, therefore, without a delivery. These principles have been decided in this court and must be regarded as settled. (*Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446; *Young v. Young*, 80 N. Y. 423, 36 Am. Rep. 634; *Matter of Crawford*, 113 N. Y. 560, 21 N. E. 692, 5 L. R. A. 71; *Beaver v. Beaver*, 117 N. Y. 421, 22 N. E. 940, 6 L. R. A. 403, 15 Am. St. Rep. 531; *Id.*, 137 N. Y. 59, 32 N. E. 998.) It is true that in *Richardson v. Richardson* (L. R. 3 Eq. Cas. 686) Vice Chancellor W. Page Wood does say, in speaking of *Ex parte Pye* (18 Ves. 140), that the holding in that case amounted to a decision that an instrument executed as a present and complete assignment (not being a mere covenant to assign on a future day) is equivalent to a declaration of trust. The expression was unfavorably criticised by Jessel, M. R., in *Richards v. Delbridge* (L. R. 18 Eq. Cas. 11), while in *Baddeley v. Baddeley* (L. R. 9 Ch. Div. 113), Vice Chancellor Malins says he is not disposed to disagree with *Richardson v. Richardson*, notwithstanding the remarks of Sir George Jessel in *Richards v. Delbridge*.

In this court, however, and in the case already cited of *Young v. Young*, this doctrine is substantially repudiated. We are of opinion that no such rule obtains or ought to obtain in this state. An intended absolute gift by way of a written assignment, which cannot take effect because of the absence of delivery, ought not to be enforced as a declaration of trust when there is no such declaration and when there is no evidence of an intention to create a trust. (*Milroy v. Lord*, 4 D. F. & J. 274.) * * *

Judgment reversed.

SLANNING and Others v. STYLE.

(In Chancery, before Lord Chancellor Talbot, 1734. 3 P. Wms. 334.)

Three sisters and their husbands, claiming as residuary legatees under the will of Robert Style, brought their bill against his widow for divers goods of the testator detained by her, which were not given her by the said will; and the widow preferred her bill for goods detained by the executors, and which (as was alleged) she was entitled to by the will.

Another thing insisted upon on behalf of the defendant, the widow, was, that the testator allowed his first wife to dispose and make profit of all such butter, eggs, poultry, pigs, fruit and other trivial matters arising from the said farm (over and besides what was used in the family) for her own separate use, calling it her pin-money; and upon the death of the first wife, and until the testator married the defendant, Style, the testator's sister, the defendant, Pelling, kept his house, and had the same allowance, which was also continued to the defendant, the widow, after her marriage, by way of pin-money; and it was proved in the cause that her husband, whenever any person came to buy any fowls, pigs, &c., would say he had nothing to do with those things, which were his wife's; and that he also confessed, that, having been making a purchase of about £1,000. value and wanting some money, he had been obliged to borrow about £100. of his wife to make up the purchase money; therefore now the widow claimed to be paid this £100.

To which it was answered, that here was no deed touching this agreement, nor any writing whatsoever, whereby to raise a separate property in a feme covert, which was what the law did not favor; that it was no more than a connivance or permission, that the wife should take these things and continue to enjoy them during his (the husband's) pleasure, which pleasure was determined by his death; besides, this agreement, being after marriage, was but a voluntary one, for which a court of equity usually leaves the party to take his remedy at law; and that, in truth, the husband's borrowing this £100. of his wife was no more than borrowing his own money.

But the Lord Chancellor decreed that the widow, the defendant, was well entitled to come in for this £100. as a creditor before the Master, observing that the courts of equity have taken notice of and allowed feme coverts to have separate interests by their husbands' agreement; and this £100. being the wife's savings, and here being evidence that the husband agreed thereto, it seemed but a reasonable encouragement to the wife's frugality, and such agreement would be of little avail were it to determine by the husband's death; that it was the strongest proof of the husband's consent, that the wife should have a separate property in the money arising by these savings, in that he had applied to her and prevailed with her to lend him

this sum; in which case he did not lay claim to it as his own, but submitted to borrow it as her money.

Wherefore, and especially as here was no creditor of the husband to contend with, it was ordered that the wife should be allowed to come in for this £100. as a creditor before the Master; and the court cited the case of *Calmady v. Calmady* [2 Eq. Cas. Abr. 469], where there was the like agreement made betwixt the husband and wife, that upon every renewal of a lease by the husband two guineas should be paid by the tenant to the wife, and this was allowed to be her separate money.

BEARD v. BEARD.

(In Chancery, before Lord Chancellor Hardwicke, 1744. 3 Atkyns, 72.)

The plaintiff's husband, a freeman of London, being at variance with his wife, in January, 1739, by his will, executed at a tavern, gives all his estate, real and personal to his brother, and makes him his executor.

In November, 1740, by a deed poll, he gives and grants unto his wife all his substance which he now has or may hereafter have.

The bill was brought by the wife, who insists upon the deed poll, and that the will was revoked by this subsequent act of the husband in his lifetime.

The counsel for the plaintiff cited *Boughton v. Boughton*, the 5th of December, 1739 [1 Atk. 625], and *Hervey v. Hervey*, November 12, 1739 [1 Atk. 561].

LORD CHANCELLOR.¹ A man here has done two very unreasonable acts; if it should happen one trips up the heels of the other, it is a very fortunate thing to set everything right again.

A wife appears here to be unprovided for, both before and after marriage.

A will is made at a tavern, probably in a passion, for the husband was parted from his wife at that time, by which he gives his whole estate to his brother.

Afterwards he is guilty of another unreasonable act,—a gift to his wife, by deed poll, of all his substance.

The question is, Which is to take effect?

The latter cannot take effect as a grant or deed of gift to the wife, because the law will not permit a man to make a grant or conveyance to the wife in his lifetime, neither will this court suffer the wife to have the whole of the husband's estate while he is living, for it is not in the nature of a provision, which is all the wife is entitled to. * * *

¹ Part of the opinion is omitted.

He declared, likewise, that the will was revoked as to all the personal estate by the deed poll, and yet it cannot take effect as a gift or grant of such personal estate to the plaintiff, but the said personal estate must be distributed.²

MEWS v. MEWS.

(In Chancery, before the Master of the Rolls, Sir John Romilly, 1852. 15 Beavan, 529.)

William Mews (deceased), carried on the business of a farmer, with his brother John Mews (a bachelor), at Apton Hall, in Essex, where they resided together, having one joint establishment. William attended principally to the farming, and exclusively to the accounts, acting as cashier; John devoted himself to the stock and sales; and the plaintiff, Harriet Mews, the wife of William kept the house, and superintended the management and sale of the butter, eggs and poultry.

It appeared that in 1835, the plaintiff Harriet Mews placed in the hands of Messrs. Eastman and Hill a sum of £90. at interest, and they opened a separate account in her name in their books. This sum was afterwards increased by addition from the produce of the butter, eggs and poultry, and ultimately amounted to £557. 8s.

William and John Mews both died. In 1851 Harriet Mews instituted this suit against the representatives of John Mews, and sought to have it declared that she was entitled to this sum, with interest, and to make the estate of John Mews liable for the same.

THE MASTER OF THE ROLLS.³ Having had an opportunity of reading the evidence very carefully, I have come to the conclusion that there is not sufficient evidence to establish a gift from the husband to the wife. * * *

I entertain no doubt that there may be a gift made by a husband to his wife, which though bad at law, would be supported in equity. * * * Lord Hardwicke, in the case of *Lucas v. Lucas* [1 Atk. 271], which has been referred to, distinctly states, that "in this Court, gifts between husband and wife have often been supported, though the law does not allow the property to pass." Though the property does not pass at law, yet, in equity, a husband being the

² A gift causa mortis, however, might be made directly by a husband to his wife. *Miller v. Miller*, 3 P. Wms. 356 (1735); *Lawson v. Lawson*, 1 P. Wms. 441 (1718); *Walter v. Hodge*, 2 Swanston, 92 (1818); *Whitney v. Wheeler*, 116 Mass. 490 (1875); *Meach v. Meach*, 24 Vt. 591, 596, 597 (1852).

³ Part of the opinion is omitted.

owner at law, may become a trustee for his wife; and if by clear and irrevocable acts he has made himself such trustee, the gift to his wife will be conclusive.²

In re BRETON'S ESTATE.

BRETON v. WOOLLVEN.

(In Chancery, before Vice Chancellor Sir Charles Hall, 1881. L. R. 17 Ch. Div. 416.)

Frederick Breton, the testator, intermarried with the plaintiff in January, 1868.

The testator having previously purchased some furniture, on the 22d of April, 1868, wrote and handed to his wife the following paper:

"This is to certify that there being now at Messrs. Maple & Co., 145 Tottenham Court Road, one hundred pounds worth of furniture belonging to me, I give the same to my dear wife Agnes A. Breton, absolutely and unreservedly, for her own use and benefit.

"Haxell's Hotel, Strand, London, April 22d, 1868.

"Fredk. Breton, Major Rl. Wilts Militia."

The testator, having purchased some plate and plated articles, wrote to the plaintiff thus:

"London, June 1st, 1868.

"My dearest Wife: I this day make you a present of the plate, &c., now at Mappin and Webb's, and which they are taking care of for me, for your sole use and benefit. The sum I paid for it is £59. 7s. 10d.

"Ever yr affecte husband,

Fredk. Breton."

The testator and his wife subsequently hired a house at Forest Hill, where they went to reside, and thereupon the furniture, plate, and plated articles were removed thither. Other furniture and household goods purchased by or belonging to the testator were placed in the same house, and on the 18th of June, 1868, he wrote and handed the following to the plaintiff:

"My dearest Wife: Having previously made over to you for your sole use and benefit a certain amount of furniture, plate, etc., I now present you with everything, furniture, linen, etc., plate, china and glass, and all jewelry now belonging to me at No. 1 Dulwich Villas, Devonshire Road, Forest Hill. All this to be yours and yours only from this date, June eighteenth, 1868. This gift from

"Yr ever affecte husband,

Fredk. Breton."

² Grant v. Grant, 34 Beav. 623 (1865) acc.

The testator and his wife subsequently went to reside in a house in the Belvedere Road, where they lived at the time of his death. To that house all the furniture, plate and plated and other articles and goods were taken from the house at Forest Hill. While the testator and his wife resided together at the two houses, the articles mentioned were used in the ordinary way, and from time to time various additions were made thereto by the testator; but during his life he always, as alleged, spoke of all the furniture and other articles and goods, and the said additions thereto, as being the sole property of his wife, and often referred to the useful provision for her comfort which she would have therein and by means thereof after his death.

The trustees and executors having insisted that all the said jewelry, furniture, plate and plated and other articles and goods, and the said additions thereto, formed part of the testator's estate, the widow brought this action to have it ascertained and declared whether the same, or any and which of them, or any and what parts thereof, belonged to her or formed part of the testator's estate; and if necessary an administration of the trusts by the Court.

HALL, V. C. I am unable to support this gift to the plaintiff, the wife, as a trust declared by her husband in her favor. I am very sorry for it, because it is a monstrous state of the law which prevents effect being given to such a gift. I think that the difficulty in the case is occasioned by two or three of the decisions which have been referred to, and which seem to favor the contention that these paper writings can be supported as a declaration of trust by the husband in favor of his wife. It was submitted that the husband must be taken to have intended, knowing what the law is, to constitute himself a trustee for her, that being the only way of giving effect to the paper writings, i. e., as other trustees were not appointed, he must be held to have constituted himself a trustee. That argument appears to me to come to this, that in every case of an imperfect gift on the part of the alleged donor, if the gift be not effectual by reason of an incomplete transfer of the property from the alleged donor to the intended donee, or to some person who is to be a trustee for the intended donee, the Court must give effect to the donation by holding that the alleged donor was a trustee, as it must be considered that he knew the law, and that if he did not effectuate his object in the one way in which it would have been valid, it must be done in another. But in truth, in the one case as well as in the other, whether a wife or a stranger be the object of the gift, it is manifest from the transaction taken by itself that the alleged donor was mistaken as regards the proper and legal mode of effectuating that which he intended to do. It is plain that the husband was mistaken, and it is not necessary to impute to him that he meant to make the gift in an ineffectual way. Looking at the documents, they are a contradiction of any intention on his part to do that.

The case of *Grant v. Grant* [34 Beav. 623] was that of a gift to a wife, and if the late Master of the Rolls had based his judgment on that ground, supporting it as being a special and peculiar case, and creating a different law as applicable to husband and wife in every case, I should have nothing more to do than to follow that decision. But it is plain, from the reasons given for the decision, that it was meant to be applicable to every other case of the kind, and not merely to that of husband and wife. No other cases of a gift by a husband to his wife have been referred to excepting the two recent decisions of Vice Chancellor Malins in the case of *Baddeley v. Baddeley* [9 Ch. Div. 113], and of Vice Chancellor Bacon in the case of *Fox v. Hawks* [13 Ch. Div. 822]. As to the former case, I observe that Vice Chancellor Malins said that the law was correctly stated in the case of *Grant v. Grant*, and that he was not disposed to disagree with the judgments in *Richardson v. Richardson* [L. R. 3 Eq. 686], and in *Morgan v. Malleeson* [L. R. 10 Eq. 475], notwithstanding the remarks of the Master of the Rolls in the case of *Richards v. Delbridge* [L. R. 18 Eq. 4]. That being so, there is, as Vice Chancellor Malins seems to have meant there should be a clear difference of opinion between himself and the Master of the Rolls upon this question, because he adopted the decision in the two cases of *Richardson v. Richardson* and *Morgan v. Malleeson*,—decisions which the Master of the Rolls would not follow. That being so, I must look at all the authorities and endeavor to find a correct statement of the law on the subject. I consider that the principal authority in these cases is that of the case of *Milroy v. Lord* [4 De G., F. & J. 264], where there is a very clear and elaborate statement of the law by the late Lord Justice Turner. A portion of the judgment of the Lord Justice was quoted by the Master of the Rolls in *Richards v. Delbridge*, and there is much in it which is, I think, applicable to this case. The Lord Justice, after stating that under the circumstances of the case before him it would be difficult not to feel a strong disposition to give effect to the settlement to the fullest extent, said, "But in order to render the settlement binding, one or the other of these modes"—i. e., transfer of the property or declaration of trust—"must, as I understand the law of this Court, be resorted to, for there is no equity in this court to perfect an imperfect gift." What I am asked to do in this case is to read that sentence as having introduced into it the words, "except as to a gift from husband to wife." The Lord Justice Turner also said, "The cases, I think, go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes." To give effect to this gift I must introduce the word, "except in the case of a wife." The Lord Justice proceeded to say, "If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being

converted into a perfect trust;" and he added that it must be plainly shown that it was the purpose of the settlement, or the intention of the settlor, to constitute himself a trustee. It is clear in this case that it was not so intended. It was not the purpose or meaning of the husband in writing these letters to constitute himself a trustee for his wife. I can well understand in such a case a husband saying to his wife, "I mean to give you this as your own, but when you ask me to be a trustee for you I must respectfully decline. I do not want to be involved in a trust of that kind or in any trust." Therefore it appears to me that, notwithstanding the decisions of Vice Chancellor Malins and Vice Chancellor Bacon in the two cases which have been observed upon—and here I may just state that the case before Vice Chancellor Bacon of *Fox v. Hawks* had many special circumstances in it which are not unlikely to have influenced his mind in arriving at the conclusion to which he came—I must hold that the furniture, plate, and other particulars, excepting the jewelry, do not belong to the plaintiff, but form part of the late husband's estate.

FLETCHER v. FLETCHER.

(In Chancery, before Vice Chancellor Sir James Wigram, 1844. 4 Hare, 67.)

The bill was filed by Jacob, a natural son of the testator, Ellis Fletcher, for the payment, by the defendants, his executors, out of the assets, of a sum of £60,000. with interest thereon, from the expiration of twelve months from the decease of the testator. The claim was founded upon a voluntary deed, executed by the testator, between four and five years before his death, which was thenceforth retained by the testator in his own possession; without having been communicated either to the trustees appointed in the deed, or, so far as it appeared to the plaintiff or the other parties interested under it, and which was ultimately discovered some years after the death of the testator, by a person the executors employed to make a schedule of his papers, by whom it was found, wrapped together with an examined copy of the same deed, in a brown paper parcel.

[By the indenture in question dated September 1, 1829, made between Ellis Fletcher and five trustees, he covenanted with them that his heirs, executors or administrators should in twelve months after his death pay said trustees £60,000. to be held by them upon certain trusts, the last of which in the events that had occurred was to pay the plaintiff on his attaining twenty-one said sum of £60,000. with any arrears of interest thereon.]

The testator died April 26, 1834. Plaintiff attained the age of twenty-one in September, 1843. The bill prayed that the indenture might be established; that plaintiff might be declared entitled to have

the £60,000. and interest and that the defendants, the executors, pay the plaintiff what should be due him.

The executors admitted assets. The surviving trustees in their answer said that they had not accepted or acted in the trusts of the indenture, but were willing to act as the Court should direct.

Mr. Romilly and Mr. Webster, for the plaintiff, submitted first that the deed though voluntary, was yet complete and effectually created a trust for the object of it; leaving nothing for the Court to perfect.

Mr. Tinney and Mr. Follett, for the infant children of the testator, contended that the deed was at the most executory, and, being founded on no valuable consideration, the Court would not interfere to give effect to the instrument.

VICE CHANCELLOR.¹ According to the authorities, I cannot, I admit, do anything to perfect the liability of the author of the trust, if it is not already perfect. This covenant, however, is already perfect. The covenantor is liable at law, and the Court is not called upon to do any act to perfect it. One question made in argument has been, whether there can be a trust of a covenant the benefit of which shall belong to a third party; but I cannot think there is any difficulty in that. Suppose, in the case of a personal covenant to pay a certain annual sum for the benefit of a third person, the trustee were to bring an action against the covenantor; would he be afterwards allowed to say he was not a trustee? If he cannot do so after once acknowledging the trust, then there is a case in which there is a trust of a covenant for another. In the case of *Clough v. Lambert* [10 Sim. 174] the question arose; the point does not appear to have been taken during the argument but the Vice Chancellor of England was of opinion that the covenant bound the party; that the cestui que trust was entitled to the benefit of it; and that the mere intervention of a trustee made no difference. The proposition, therefore, that in no case can there be a trust of a covenant, is clearly too large, and the real question is, whether the relation of trustee and cestui que trust is established in the present case. * * *

If the trustees have in this case accepted the trust, I think the decision in *Clough v. Lambert* applies; and if they have not accepted the trust, I scarcely think that fact can make a difference. It is an extraordinary proposition that nothing being wanted to perfect the liability of the estate to pay the debt, the plaintiff has no right in equity to obtain the benefit of the trust.

¹ Part of the opinion is omitted.

NOTE.

Gifts.

Gifts are *inter vivos*, *causa mortis*, or by last will. The requisites of a gift are, of course, the same whether in trust or not.

REAL ESTATE. As we have seen, a gift *causa mortis* of real estate cannot be made. A gift of real estate, therefore, must be *inter vivos* or by last will, and cannot be perfect unless the donee be vested with the legal title, or at least have the right to call for it without further action by the donor.

LEGAL CHOSSES IN POSSESSION, OR TANGIBLE CHATTELS. A gift of a tangible chattel may be *inter vivos*, *causa mortis*, or by last will. It cannot be perfect unless the legal title be vested in the donee. The ordinary way of making such a gift is by delivering the chattel to the donee with the intention of passing to him the title. *Faxon v. Durant*, 9 Metc. (Mass.) 339 (1845).

A gift of a chattel may, however, be made by a delivery of a deed of gift without a delivery of the chattel. Gifts *inter vivos*: *Bunn v. Winthrop*, 1 Johns. Ch. 329 (1815); *Davis, Adm'r, v. Garrett*, 91 Tenn. 147, 18 S. W. 113 (1892). Gifts *causa mortis*: *Meach v. Meach*, 24 Vt. 591 (1852).

LEGAL CHOSSES IN ACTION. How is a perfect gift of a legal chose in action made? It is for the most part in dealing with gifts of choses in action that variety of decision has developed.

The legal title to some choses in action may be transferred. The legal title, for example, to a bill of exchange or promissory note payable to bearer may be transferred by a delivery of the instrument with the intent of passing the title. So the legal title to a bill of exchange or promissory note payable to order may be transferred by indorsing and delivering the instrument with like intent. But the legal title to many choses in action is incapable of transfer. The assignment, so called, of such a chose in action, is not a true assignment. The assignee does not get the legal title and cannot sue in his own name. He gets, not the legal title, but a power of attorney, which enables him to sue the obligor in a court of law in the assignor's name and to retain for his own use what he may collect. The courts frequently speak of such an assignment as an equitable assignment. The expression lacks accuracy, as the right to sue given by such an assignment is a right to sue in a court of law, not in a court of equity. *Hammond v. Messenger*, 9 Sim. 327 (1838); *Hayward v. Andrews*, 106 U. S. 672, 1 Sup. Ct. 544, 27 L. Ed. 271 (1882); *Walker v. Brooks*, 125 Mass. 241 (1878).

The law of the assignment of choses in action has been a growth. In Co. Lit. 232a, we read: "A man may give or grant his deed to another, and such grant by parol is good. And it is also implied, that if a man hath an obligation, though he cannot grant the thing in action, yet he may give or grant the deed, viz. the parchment and wax to another, who may cancel and use the same at his pleasure."

In Coke's time an assignment of a chose in action was deemed valid only when made to a creditor on account of a precedent debt. Y. B. H. T. 15 Hen. VII, 2, pl. 3; Brooke's Abridgment, Chose in Action, pl. 3; South v. Marsh, 3 Leon. 234, pl. 320 (1590); *Harvey v. Bateman*, Noy, 52 (1600). If made by way of gift, the assignment was invalid. South v. Marsh, 3 Leon. 234, pl. 320 (1590). So if made to a vendee. Y. B. 37 Hen. VI, 13, pl. 3; *Harvey v. Bateman*, Noy, 52 (1600); Jenkin's Century Cases, 108, pl. 7.

Equity maintained the same distinction as late as 1677. Freeman's Ch. 145. In *Lord Carteret v. Paschal*, 3 P. Wms. 197 (1733), the validity of a voluntary assignment of a chose in action was said to be admitted on all sides. And in *Row v. Dawson*, 1 Ves. Sr. 331, 332 (1749), Lord Chancellor Hardwicke said that, though the law did not admit an assignment of a chose in action, the court of chancery did, and that in the case of a bond it might be assigned in equity for valuable consideration and the assignment be good, though no special form were used.

Furthermore in Coke's time the assignee who would sue at law in his assignor's name must have an express power of attorney. *Mallory v. Lane*, Cro. Jac. 342 (1615). An implied power of attorney was a thing then unknown. All this is now changed. A power of attorney in favor of a vendee or donee

is as valid as if in favor of a creditor, and it need not be express, but may be implied from circumstances. See Dean Ames, 1 Harvard Law Rev. 6, and 3 Harvard Law Rev. 340, 341.

Greater consistency might have been secured had the courts agreed that to a perfect gift of a chose in action it is enough that the donee obtain a power of attorney entitling him to sue at law in the assignor's name, even though the legal title to the particular chose in action may be capable of transfer.

VARIOUS KINDS OF LEGAL CHOSSES IN ACTION. (1) *Bonds*. In *Snellgrove v. Baily*, 3 Atk. 214 (1744), Lord Chancellor Hardwicke held that a gift causa mortis of a bond might be made by a mere delivery of the bond without writing. So in *Duffield v. Elwes*, 1 Bligh, N. R. 497 (1827), the House of Lords held that a gift causa mortis of a bond and mortgage might be made by mere delivery of the same without writing.

In *Edwards v. Jones*, 1 Myl. & Cr. 226 (1836), Lord Chancellor Cottenham held that a gift of a bond inter vivos could not be made by a delivery of the bond, even though accompanied by an express power of attorney indorsed thereon. No justification appears for this distinction between gifts of bonds causa mortis and inter vivos. The doctrine of *Edwards v. Jones* leads to this unfortunate result: The donee of a bond has the legal title to it as a chattel, but cannot sue at law in the obligor's name to collect the debt; the donor cannot recover the bond from the donee, and yet for want of it is remediless against the obligor.

In the United States this result is avoided by treating gifts inter vivos and gifts causa mortis alike. The mere delivery of the bond, without writing, not only gives the donee the legal title to the bond as a chattel, but confers on him an implied power of attorney to sue at law the obligor in the assignor's name. Gifts causa mortis: *Waring, Adm'r, v. Edmonds*, 11 Md. 424 (1857); *Wells, Adm'r, v. Tucker and Wife*, 3 Bin. (Pa.) 366 (1811). Gifts inter vivos: *Elam v. Keen*, 4 Leigh (Va.) 333, 26 Am. Dec. 322 (1833); *Hunter v. Hunter*, 19 Barb. (N. Y.) 631 (1855); *Gannon v. McGuire*, 160 N. Y. 476, 55 N. E. 7, 73 Am. St. Rep. 694 (1899).

The delivery of a deed of gift of a bond, without a delivery of the bond, should be effectual to pass the legal title to the bond as a chattel, and also to confer upon the donee a power of attorney to sue in the assignor's name. See *Brownlow & Goldesborough*, 40; *Drakeford v. Wilks*, 3 Atk. 539 (1747).

(2) *Life Insurance Policies*. A perfect gift inter vivos of a life insurance policy may be made by a delivery of the policy without writing. *Marcus v. St. Louis Mut. Life Ins. Co.*, 68 N. Y. 625 (1877); *McGlynn v. Curry*, 82 App. Div. 431, 81 N. Y. Supp. 855 (1903); *Travelers' Ins. Co. of Hartford, Conn., v. Grant, Adm'r*, 54 N. J. Eq. 208, 33 Atl. 1060 (1896).

A gift causa mortis of a life insurance policy may be made by a mere delivery of the policy without writing. *Witt, Adm'r, v. Amis*, 1 B. & S. 109 (1861); *Amis v. Witt*, 33 Beav. 619 (1864).

The delivery of a deed of gift of a policy of life insurance is as effectual as the delivery of the policy of insurance itself. Gifts inter vivos: *Fortescue v. Barnett*, 3 Myl. & K. 36 (1834); *Pearson v. Amicable Assurance Office*, 27 Beav. 229 (1859). Gifts causa mortis: *Williams, Adm'r, v. Guile*, 117 N. Y. 343, 22 N. E. 1071, 6 L. R. A. 366 (1889). In the last case, however, the policy as well as the deed of gift were delivered to the donee.

(3) *Promissory Notes*. A perfect gift inter vivos of a promissory note payable to the order of the donor may be made by a delivery of the note to the donee, without indorsement and without writing. *Wing v. Merchant*, 57 Me. 383 (1869); *Grover v. Grover*, 24 Pick. 261, 35 Am. Dec. 319 (1835); *Hopkins v. Manchester*, 16 R. I. 663, 19 Atl. 243, 7 L. R. A. 387 (1889); *Corle v. Monkhouse*, 50 N. J. Eq. 537, 25 Atl. 157 (1892). A perfect gift causa mortis of such a note may be made in the same manner. *Bates v. Kempton*, 7 Gray (Mass.) 382 (1856).

That a gift inter vivos of a promissory note payable to the donor's order may be made by a delivery of a deed of gift without a delivery of the note was held in *Walker v. Crews*, 73 Ala. 412 (1882).

A gift inter vivos of the donor's own promissory note payable to the donee or order cannot be made. *Warren v. Durfee*, 126 Mass. 338 (1879); *Bartlett, Petitioner*, 163 Mass. 509, 515, 40 N. E. 899 (1895); *Holliday v. Atkinson*, 5 B. & C. 501 (1826).

Nor can a gift causa mortis of such a note be made. *Parish v. Stone*, 14 Pick. (Mass.) 198, 25 Am. Dec. 378 (1833); *Harris v. Clark*, 3 N. Y. 93, 51 Am. Dec. 352 (1849).

A gift causa mortis of a promissory note payable to the donor's order can be made by a delivery of the note without writing. *Veal v. Veal*, 27 Beav. 303 (1859).

A gift causa mortis of a promissory note and mortgage, made by a delivery of the note and mortgage to the donee, is good. *Borneman v. Sidlinger*, 15 Me. 429, 33 Am. Dec. 626 (1839).

But in *McHugh v. O'Connor*, 91 Ala. 243, 9 South. 165 (1891) a delivery of a mortgage without the note was held to be ineffectual as a gift of the note.

(4) *Shares of Stock*. A gift inter vivos of stock may be made by a delivery of the certificate with an express power of attorney. *Cushman v. Thayer Mfg. Jewelry Company*, 76 N. Y. 365, 32 Am. Rep. 315 (1879); *Walker v. Dixon Crucible Co.*, 47 N. J. Eq. 342, 20 Atl. 885 (1890); *Matthews v. Hoagland*, 48 N. J. Eq. 455, 21 Atl. 1054 (1891).

A gift inter vivos of stock may be made by a delivery of the certificate without any express power of attorney. *First Nat. Bank of Richmond v. Holland*, 99 Va. 495, 39 S. E. 126, 55 L. R. A. 155, 86 Am. St. Rep. 898 (1901); *Commonwealth v. Compton*, 137 Pa. 138, 20 Atl. 417 (1890); *Leyson v. Davis*, 17 Mont. 220, 42 Pac. 775, 31 L. R. A. 429 (1895).

A gift causa mortis of stock may be made by a delivery of the certificate without an express power of attorney. *Walsh v. Sexton*, 55 Barb. (N. Y.) 251 (1869).

A gift causa mortis of stock may be made by a delivery of a deed of gift without a delivery of the certificate. *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313 (1872).

In *De Caumont v. Bogert*, 36 Hun, 382 (1885), the donor, who owned shares of stock for which certificates had not been issued, by voluntary deeds assigned the same to different persons, and it was held that the gifts were valid as against the donor's legal representative.

In England a difference of opinion seems to exist as to what is essential to constitute a gift of shares of stock. In *Milroy v. Lord*, 4 De G., F. & J., 264 (1862), and *Bridge v. Bridge*, 16 Beav. 315, 321 (1852), it was considered necessary to a perfect gift that the donee should have the legal title by being registered as owner upon the books of the company. In *Kiddill v. Farnell*, 3 Smale & G. 428 (1857), Vice Chancellor Stuart thought that the gift was perfect if the donee had a power of attorney giving him the right to force the registration of his name upon the books of the company as owner. The same view was taken in Ireland in the case of *West v. West*, L. R. 9 Ir. Ch. 121 (1882).

(5) *Savings Bank Books*. A gift inter vivos of a savings bank book may be made by a delivery with an express power of attorney. *Kimball v. Leland*, 110 Mass. 325 (1872); *Foss v. Lowell Five Cents Savings Bank*, 111 Mass. 285 (1873).

A gift inter vivos of a savings bank book may be made by a delivery of the book without any writing. *Camp's Appeal*, 36 Conn. 88, 4 Am. Rep. 39 (1869); *Hill v. Stevenson*, 63 Me. 364, 18 Am. Rep. 231 (1873); *Polley v. Hicks*, 58 Ohio St. 218, 50 N. E. 809, 41 L. R. A. 858 (1898); *Providence Institution for Savings v. Taft*, 14 R. I. 502 (1884); *Watson v. Watson*, 69 Vt. 243, 39 Atl. 201 (1896).

A gift causa mortis of a savings bank book may be made by a delivery of the book with an express power of attorney. *Sheedy v. Roach*, 124 Mass. 472, 26 Am. Rep. 680 (1878). It may also be made by a delivery of the book without any express power of attorney. *Ridden v. Thrall*, 125 N. Y. 572, 26 N. E. 627, 11 L. R. A. 684, 21 Am. St. Rep. 758 (1891); *Pierce v. Boston Five Cents Savings Bank*, 129 Mass. 425, 37 Am. Rep. 371 (1880); *Tillinghast v. Wheaton*, 8 R. I. 536, 5 Am. Rep. 621, 94 Am. Dec. 126 (1867).

In *Jones v. Weakley*, 99 Ala. 441, 12 South. 420, 19 L. R. A. 700, 42 Am. St. Rep. 84 (1893) it was held that the delivery of a pass book upon an ordinary bank of deposit was not a gift of the deposit.

(6) *Certificates of Deposit*. A gift causa mortis of a certificate of deposit may be made by a delivery of it unindorsed. *Westerlo v. De Witt*, 36 N. Y. 340, 93 Am. Dec. 517 (1867); *Moore v. Moore*, L. R. 18 Eq. 474 (1874); In re *Dillon*, L. R. 44 Ch. Div. 76 (1890). A doubt is suggested in *Re Dillon* as to

whether a gift *inter vivos* of a certificate of deposit can be made by a delivery of it unindorsed.

(7) *Lottery Tickets*. A gift of a lottery ticket may be made by a delivery of it without writing. *Inter vivos*: *Grangiac v. Arden*, 10 Johns. (N. Y.) 293 (1813). *Causa mortis*: *Gold v. Rutland*, 1 Eq. Ab. 346 (1719).

(8) *Exchequer Tally*. *Causa mortis*: *Jones v. Selby*, Prec. Ch. 300 (semble).

(9) *Judgments*. It is said that a gift of a judgment may be made without a written assignment and by a delivery of the same. *Mack v. Mack*, 3 Hun, 323 (1874). Presumably what is meant is by a delivery of a copy of the judgment. It is doubtful whether a gift of a judgment can be so made in England. See *Patterson v. Williams*, L. & G. t. Pl. 95 (1834).

What has been said as to the gift of a chose in action is limited to a gift of the whole of a chose in action. A gift of part of a chose in action does not create a power of attorney, and give the so-called assignee a right to sue in the assignor's name in a common-law court. The operation of an assignment of a part of a legal chose in action is to create an equitable charge enforceable only in a court of equity, and to the creation of such a charge a consideration is necessary. *Alger v. Scott*, 54 N. Y. 14 (1873).

EQUITABLE CHOSSES IN ACTION. That a *cestui que trust* could make an assignment by way of gift of his interest, whether present or reversionary, seems to have been settled by the decision of Lord Eldon in *Ellison v. Ellison*, 6 Ves. Jr. 656 (1802), and of Sir William Grant in *Sloane v. Cadogan*, Sugden V. & P. (10th Ed.) Appendix, 66 (1808). The principles involved in these decisions seem to have been disregarded for a time in England. See *Meek v. Kettlewell*, 5 Hare, 464 (1842), affirmed 1 Phillips, 343 (1843). The case of *Keke-wich v. Manning*, 1 De G., Macn. & G. 176 (1851), did much to restore the law as left by Lord Eldon and Sir William Grant. To-day a *cestui que trust* may without doubt make a gratuitous assignment of the whole of his equitable interest, whether present or reversionary.

Here, also, what has been said in reference to the assignment is limited to the assignment of the whole of the *cestui que trust's* interest. An assignment of a part of a *cestui que trust's* interest creates but an equitable charge, and is not valid without a consideration. In *re Lucan*, L. R. 45 Ch. Div. 470 (1890).

A distinction should be noted between a gift by will of real estate and of personal property. The title to real estate passes by the will directly to the devisee. The title to personal property always passes to the executor, and the legatee in trust derives his title from the executor. *Lockman v. Reilly*, 95 N. Y. 64, 72 (1884).

SECTION 5.—THE SUBJECT-MATTER OF A TRUST.

JEWELL v. BARNES' ADMINISTRATOR.

(Court of Appeals of Kentucky, 1901. 110 Ky. 329, 61 S. W. 360, 53 L. R. A. 377.)

HOBSON, J.¹ Appellant, Robert M. Jewell, filed this suit against the appellees, the Louisville Trust Company, as the administrator with the will annexed, and S. S. Barnes, the residuary devisee of C. P. Barnes, deceased. The court below sustained a demurrer to his petition, and, he failing to plead further, dismissed the action. The only question on the appeal is, therefore, did the petition state a cause of action?

¹ Part of the opinion is omitted.

It was alleged in the petition that C. P. Barnes was at the time of his death, and had been for many years theretofore, engaged in business as a jeweler, with his brother, J. B. Barnes under the firm name of C. P. Barnes & Co.; that the business was a large one, and C. P. Barnes became a wealthy man; that in the year 1877, when appellant was a small boy, the deceased took him into his employ and treated him as if he had been his own son, often promising him an interest in the business; that appellant started with a small salary, which was increased from time to time until the death of the deceased, when he was receiving \$20 a week; that the deceased died, leaving a will which was duly admitted to probate, and by the seventh clause of the will the testator provided for him in the following language: "I desire that my friend Robert M. Jewell be retained in the employ of the firm on such liberal terms as his long and faithful service entitles him to." It is also alleged that on February 23, 1895, within a month after the death of the testator, against his protest, his salary was cut down from \$20 to \$15 a week, and three years later, on February 26, 1898, to \$13.50 a week; that about two months after this, without fault on his part, he was discharged, against his protest, and had been unable to earn anything like \$20 a week from the time of his discharge to the filing of the suit; that appellees were running the store with great profit, and it was incumbent on them, under the will, to keep him in their employment at \$20 a week; that his wages for the time amounted to \$4,780, and he had only received \$3,045.70, leaving a balance due him of \$1,734.30; that C. P. Barnes was the owner of a larger interest in the firm than his brother, J. B. Barnes, and by his will gave to his brother enough of his holdings in the firm to make the brother and the testator's widow, appellee, S. S. Barnes, equal partners in the business; that they continued the business under the same firm name from the death of the testator, on February 5, 1895, until May 19, 1897, when the brother, J. B. Barnes, sold out his interest in the firm to the widow, appellee, S. S. Barnes; and that she has continued the business under the name of C. P. Barnes & Co. It will be observed that the brother, J. B. Barnes, is not sued. The suit is brought against the personal representative and the widow, as residuary devisee. It will be also observed that, although appellant's salary was cut down to \$15 soon after the testator's death, he continued with the firm and continued to accept the salary that was paid him; and things remained in this shape until after J. B. Barnes sold out, and appellee S. S. Barnes took charge of the business in her own right, after the dissolution of that firm, and appellant continued to work for her and to accept the reduced salary from her until he was discharged by her something like a year afterwards.

It is insisted for appellant with great earnestness that the will creates a precatory trust in his favor, and that he is entitled under the will to his wages at \$20 per week. The will does not fix the salary

that appellant is to receive if retained in the employ of the firm, nor does it require that he shall be retained. The language imports no more than an expression of the testator's desire, and the clause was, no doubt, put in this shape so as not to embarrass the devisees in the management of their affairs. The will contemplated that the brother and wife of the testator, as a firm, would continue the business; and to this firm the testator expressed the desire that it would retain appellant in its employ on such liberal terms as his long and faithful service entitled him to. The amount of compensation is expressly left to the firm, and no desire is expressed as to anything that should be done after that firm went out of business. The suit here is not against that firm, and if this action can be maintained, the clause in question will amount, in substance, to a charge of an annuity upon the widow, appellee, S. S. Barnes, in favor of appellant, unless she quits the business. The testator clearly intended no such result. In *Shaw v. Lawless*, 5 Clark & F., 129, the testator expressed his "particular desire" that the devisee, when he received the property, should continue L. "in the receipt and management thereof, and likewise employ and retain him in the receipt, agency and management of the rents," at the usual fees allowed to agents, for this reason, as expressed in the will: "He having acted for me since I became possessed of said estate, fully to my satisfaction." It was held that no precatory trust resulted. Among other things, the Lord Chancellor said: "All cases upon a subject like this must proceed on a consideration of what was the intention of the testator. Now, the first observation that strikes one with reference to that matter is that during the life of the testator Lawless was his agent. But then he was agent only during the testator's pleasure, and by the terms of the will the testator desired that he should continue in the agency. Is that desire to be considered a command? If so, for what length of time is he to continue. * * * If Lawless is the equitable incumbrancer to the amount of one-twentieth part of the income of the estate, he has a clear interest in the residue, for he might take one-twentieth part of the residue; he might file a bill in chancery in order to control the application of the residue and claim to be absolutely invested in what he is entitled to receive, namely, this one-twentieth part." So, here, if the clause in question created a precatory trust, appellant would have been entitled to maintain a bill in equity to protect his rights and prevent the firm from taking any steps that might imperil his annuity. Such a right might render the estate of the devisee materially less valuable, and make appellant to no small extent, the real beneficiary under the will. The case above referred to was followed in *Foster v. Elsley*, 19 Ch. Div. 518, and *Finden v. Stephens*, 22 Eng. Ch. 142. See, also, *Perry, Trusts*, § 123. The firm composed of the widow and the brother were not required to continue the business. They might close it out at pleasure. If

they had sold to a stranger, clearly no trust would have attached in favor of appellant to the assets in their hands received from the sale. When the brother sold to the widow, he was acquit of all responsibility. It was not the testator's purpose to create a permanent charge on the corpus of the estate in the hands of the devisees; and the widow after her purchase was under no obligation to keep appellant indefinitely in her service, regardless of the amount of the business she did, or other circumstances affecting her interest. Judgment affirmed.²

SECTION 6.—THE CESTUI QUE TRUST.³

MORICE v. BISHOP OF DURHAM.

(In Chancery, before the Master of the Rolls, Sir William Grant, 1804. 9 Ves. Jr. 399.)

Ann Cracherode, by her will, dated the 16th of April, 1801, and duly executed to pass real estate, after giving several legacies to her next of kin and others, some of which she directed to be paid out of the produce of her real estate, directed to be sold, bequeathed all her personal estate to the Bishop of Durham, his executors, &c., upon trust to pay her debts and legacies, &c.; and to dispose of the ultimate residue to such objects of benevolence and liberality as the Bishop of Durham in his own discretion shall most approve of; and she appointed the Bishop her sole executor.

The bill was filed by the next of kin to have the will established except as to the residuary bequest, and that such bequest may be declared void. The Attorney General was made a defendant. The

² The trust res may be realty or personalty. A chose in action as well as a chose in possession may form the trust res. *Fletcher v. Fletcher*, 4 Hare, 67 (1844); *Fogg v. Middleton*, 2 Hill, Ch. (S. C.) 591 (1837).

Purely personal rights cannot be held in trust, such as a peerage or office. The right of either party to a contract of marriage, doubtless, could not be made the subject of a trust. On grounds of public policy some rights that are assignable are in some jurisdictions forbidden to be made the subject of a trust.

³ The cases in this section should be read in connection with two papers, "The Failure of the 'Tilden Trust,'" by Dean Ames, 5 *Harvard Law Review*, 389, and "Gifts for a Noncharitable Purpose," by Prof. Gray, 15 *Harvard Law Review*, 509; the first attacking and the second supporting the doctrine of *Morice v. Bishop of Durham*.

A direct result of Dean Ames' criticism of the decision in the Case of the Tilden Will, 130 N. Y. 29, 28 N. E. 880, 14 L. R. A. 33, 27 Am. St. Rep. 487 (1891), was the passage by the Legislature of New York of chapter 701, p. 1748, Laws 1893 (amended by chapter 291, p. 751, Laws 1901), which restored the English law of charitable trusts. The principal case, however, still remains the law of New York, and makes a definite cestui necessary to the validity of a noncharitable trust.

Bishop by his answer, expressly disclaimed any beneficial interest in himself personally.

THE MASTER OF THE ROLLS.¹ The only question is, whether the trust, upon which the residue of the personal estate is bequeathed, be a trust for charitable purposes. That it is upon some trust, and not for the personal benefit of the Bishop, is clear from the words of the will, and is admitted by his Lordship, who expressly disclaims any beneficial interest. That it is a trust, unless it be of a charitable nature, too indefinite to be executed by this court, has not been, and cannot be, denied. There can be no trust over the exercise of which this court will not assume a control; for an uncontrollable power of disposition would be ownership, and not trust. If there be a clear trust, but for uncertain objects, the property, that is the subject of the trust, is undisposed of, and the benefit of such trust must result to those, to whom the law gives the ownership in default of disposition by the former owner. But this doctrine does not hold good with regard to trusts for charity. Every other trust must have a definite object. There must be somebody, in whose favor the court can decree performance. But it is now settled, upon authority, which it is too late to controvert, that where a charitable purpose is expressed, however general, the bequest will not fail on account of the uncertainty of the object; but the particular mode of application will be directed by the King in some cases, in others by this court.

Then is this a trust for charity? Do purposes of liberality and benevolence mean the same as objects of charity? That word in its widest sense denotes all the good affections men ought to bear towards each other; in its most restricted and common sense, relief of the poor. In neither of these senses is it employed in this court. Here its signification is derived chiefly from the Statute of Elizabeth [St. 43 Eliz. c. 4]. Those purposes are considered charitable, which that Statute enumerates, or which by analogies are deemed within its spirit and intendment; and to some such purpose every bequest to charity generally shall be applied. But it is clear liberality and benevolence can find numberless objects, not involved in that Statute in the largest construction of it. The use of the word "charitable" seems to have been purposely avoided in this will, in order to leave the bishop the most unrestrained discretion. Supposing, the uncertainty of the trust no objection to its validity, could it be contended to be an abuse of the trust to employ this fund upon objects, which all mankind would allow to be objects of liberality and benevolence; though not to be said, in the language of this court, to be objects also of charity? By what rule of construction could it be said, all objects of liberality and benevolence are excluded, which do not fall within the Statute of Elizabeth? The question is, not whether he may not apply it upon purposes strictly charitable, but whether he is

¹ Part of the opinion is omitted.

bound so to apply it. * * * The trusts may be completely executed without bestowing any part of this residue upon purposes strictly charitable. The residue therefore cannot be said to be given to charitable purposes; and, as the trust is too indefinite to be disposed of to any other purpose it follows that the residue remains undisposed of; and must be distributed among the next of kin.²

MUSSETT v. BINGLE.

(In the High Court of Justice, Chancery Division, before Vice Chancellor Sir Charles Hall, 1876. Wkly. Notes [1876] 170.)

In this cause, which now came on upon further consideration, the testator had by his will directed his executors to apply £300 in erecting a monument to his wife's first husband, and also to invest £200 and apply the interest in keeping up the monument. It was admitted that the latter direction was bad,³ and the question argued was whether the former direction was good.

The trustees were ready to carry out the testator's wishes, but some of the beneficiaries contended that the first direction was void as purely "honorary."

THE VICE CHANCELLOR said that the direction to the executors was a perfectly good one, and one which they were ready to perform, and it must be performed accordingly.⁴

GOTT v. NAIRNE.

(In the High Court of Justice, Chancery Division, before Vice Chancellor Sir Charles Hall, 1876. 35 Law Times Reports, 209.)

Demurrer. William Gott, by a codicil to his will, bequeathed to R. Nairne and T. W. Nelson the sum of £12,000., upon trust that they or the survivor of them, or the executors or administrators of

² Affirmed on appeal by Lord Chancellor Eldon, 10 Ves. Jr. 522.

³ Previous to the decision in *Lloyd v. Lloyd*, 2 Sim. N. S. 255 (1852), a gift for the repair of a monument was considered a gift for a charitable purpose, and therefore valid, though to last for all time. That case, which held that such a gift was not for a charitable purpose, has been generally followed.

⁴ The cost of erecting a monument to a dead man is part of his funeral expense, and to be justified as such. *Fite v. Beasley*, 12 Lea (Tenn.) 328 (1883); *McGlinsey's Appeal*, 14 S. & R. (Pa.) 64, 66 (1826); *Fairman's Appeal*, 30 Conn. 205, 209 (1861); *Killebrew v. Murphy*, 3 Heisk. (Tenn.) 546, 558 (1871); *Detwiller v. Hartman*, 37 N. J. Eq. 347 (1883).

In *Gilmer's Legatees v. Gilmer's Executors*, 42 Ala. 9 (1868), a bequest for the erection of monuments to the memory "of Gen. Stonewall Jackson, of Virginia, and Cols. Thomas Cobb and Bartow, of Georgia," was held valid. This, however, may be sustained as a gift for a charitable purpose.

The question involved in the principal case seems quite different. It was not a question of funeral expense.

such survivor, should, as soon as conveniently might be after the testator's decease, but nevertheless at their sole and absolute discretion, invest the whole or such part as they should think fit of the said sum of £12,000. in the purchase of an advowson and right of patronage of, in, and to some ecclesiastical benefice in England, with the right of next presentation thereto. And the testator directed that until his son, John Gott, should be duly presented to and inducted into some ecclesiastical benefice which should produce a net annual income of £1,000. at the least (after deducting the necessary charges and outgoings in respect thereof), or should previously depart this life, the trustees should nominate to the said ecclesiastical benefice, when and so often as any vacancy should occur, such fit and proper person as they might in their uncontrolled discretion select or choose for that purpose. Subject as aforesaid, the trustees were to stand possessed of the advowson and right of presentation in trust for John Gott, his heirs and assigns. The testator also directed that until the £12,000., or such part of it as the trustees should think fit, had been invested as aforesaid, they should invest it in specified securities, and for the term of twenty-one years from the date of his death, accumulate it and the income thereof, by way of compound interest. And he declared that such accumulated fund should be applicable to the purchase of the advowson, and that the interest of the £12,000. and the accumulations thereof, together with the securities in which they might be invested at the expiration of the twenty-one years, should, so far as they had not been laid out in the purchase of the advowson, belong and be paid to John Gott, his executors or administrators. Provided, however, that if John Gott should die or be inducted into some ecclesiastical benefice of the annual value aforesaid before the trustees had entered into any contract for the purchase of an advowson, or if any part of the £12,000., or the accumulations thereof, should remain undisposed of after completing such contract, then the £12,000. and the accumulations thereof, or so much of the same as should remain undisposed of, should belong and be paid to John Gott, his executors or administrators.

The testator died in 1863. The trustees had received the £12,000. and invested it and the accumulations as directed, but no purchase of an advowson had been made.

John Gott, the son, had been presented to the vicarage of Leeds, and it was in dispute between the trustees and himself whether or not the benefice was worth a clear £1,000. a year.

The action was brought by John Gott against the trustees.

The statement of claims set out the above-mentioned facts, but claimed to have the trust fund handed over to the plaintiff, irrespective of any question as to the value of his present living.

The defendants demurred generally.

G. Hastings, Q. C., and Kekewich, for the demurrer. The defendants do not decline to carry out the trust created by this will.

The plaintiff, therefore, cannot claim this fund, unless he can show that he is the exclusive object of the trust. But it is clear that the trustees may, at any time until the expiration of twenty-one years from the testator's death, create a cestui que trust by purchasing an advowson and presenting some person other than the plaintiff to it. The case is like that of *Mussett v. Bingle*, where a bequest to erect a tombstone was upheld, the trustees being willing to carry it out. They cited *Harbin v. Masterman* [25 L. T. Rep. N. S. 200, L. R. 12 Eq. 559], and *Talbot v. Jevers* [L. R. 20 Eq. 255].

Dickinson, Q. C., and Ingle Joyce for the plaintiff. Both the fund and the advowson belong to the plaintiff, subject to the direction to accumulate the interest on the fund and the purchase of and presentation to an advowson. As to the accumulation, it is clear that where there is a simple direction to accumulate a fund and give it to A. twenty-one years hence, he, if of full age, is entitled to receive it at once. As to the purchase of the advowson, there are a series of cases of which *Gosling v. Gosling* [John. 265] is the most important, showing that the legatee in such a case is entitled to have the fund at once, unless the testator has shown a clear intention that someone shall have the enjoyment of it in the meantime. Here the testator's object was evidently to benefit the plaintiff alone, it being clear that there was no other person whom he specially wished to benefit. There is no trust for any person except the plaintiff, no person who now or at any time can call upon the trustees to purchase a living. *Harbin v. Masterman* is in our favor, for there the Vice Chancellor would have divided the fund amongst the residuary legatees, had they not been charities. They cited *Thomson v. Shakespeare* [John. 612, 1 De G., F. & J.]; *Lewin on Trusts* (6th Ed.) 94.

THE VICE CHANCELLOR. In this case the trustees disclaim any beneficial interest in the fund in question, but do not say that they are unwilling to perform the trust. They do not look upon this trust as beneficial to themselves, but—there being something to be done, perfectly legal—the trustees are desirous to do it. The plaintiff, then, not having shown that the trusts are simply and solely for his benefit, and such as he has a right to put an end to, the demurrer must be allowed. I see no reason why the trustees should not be allowed to carry out this trust. And it is to be observed, that they are to nominate to the benefice, when purchased, “when and so often as any vacancy shall occur.” So that even if they purchased an advowson and presented the plaintiff himself to it, that would not at once put an end to their trust. Moreover, it does not follow that the whole fund would be expended in purchasing the advowson. The demurrer must, consequently, be allowed; but the plaintiff will have leave to amend, and thus raise the question of the net value of his present benefice.

In re DEAN.

COOPER-DEAN v. STEVENS.

(In the High Court of Justice, Chancery Division, 1889. L. R. 41 Ch. Div. 552.)

William Clapcott Dean, by his will dated the 12th of November, 1887, devised all his freehold estates, subject to and charged with certain annuities, and with an annuity of £750. thereafter mentioned to his trustees, and to a term of fifty years thereafter granted to his trustees, to the use of his trustees, for the term of one year from the day preceding his death, upon certain trusts, and, subject thereto, to the use of James Cooper (the plaintiff) for his life, with remainder to the use of the plaintiff's first and other sons, successively in tail male, with remainders over. The will continued: "I give to my trustees my eight horses and ponies (excluding cart horses) at Littledown, and also my hounds in the kennels there. And I charge my freehold estates hereinbefore demised and devised, in priority to all other charges created by this my will, with the payment to my trustees for the term of fifty years commencing from my death, if any of the said horses and hounds shall so long live, of an annual sum of £750. And I declare that my trustees shall apply the said annual sum payable to them under this clause in the maintenance of the said horses and hounds for the time being living, and in maintaining the stables, kennels and buildings now inhabited by the said animals in such condition of repair as my trustees may deem fit; but this condition shall not imply any obligation on my trustees to leave the said stables, kennels, and buildings in a state of repair at the determination of the said term; but I declare that my trustees shall not be bound to render any account of the application or expenditure of the said sum of £750., and any part thereof remaining unapplied shall be dealt with by them at their sole discretion." * * *

The testator died on the 3d of December, 1887. This was an originating summons by James Cooper, who had assumed the name of Dean, as plaintiff, against the trustees of the will, asking a declaration that the gift of the £750. a year to the defendants for the purposes mentioned in the will was invalid, or, in the alternative, a declaration that the plaintiff was entitled under the trusts of the will to the balance from time to time in any year, commencing from the testator's death, of the £750., after making provision for the maintenance of the testator's horses, hounds, stables, kennels, and buildings mentioned in his will.

NORTH, J.¹ The first question is as to the validity of the provision made by the testator in favor of his horses and dogs. It is said that it is not valid; because (for this is the principal ground upon which it is put) neither a horse nor a dog could enforce the trust; and

¹ Part of the statement of the case, as also of the opinion, is omitted.

there is no person who could enforce it. It is obviously not a charity, because it is intended for the benefit of the particular animals mentioned, and not for the benefit of animals generally, and it is quite distinguishable from the gift made in a subsequent part of the will to the Royal Society for the Prevention of Cruelty to Animals, which may well be a charity. In my opinion this provision for the particular horses and hounds referred to in the will is not, in any sense, a charity, and, if it were, of course the whole gift would fail, because it is a gift of an annuity arising out of land alone. But, in my opinion, as it is not a charity, there is nothing in the fact that the annuity arises out of land to prevent its being a good gift.

Then it is said, that there is no cestui que trust who can enforce the trust, and that the Court will not recognize a trust unless it is capable of being enforced by someone. I do not assent to that view. There is not the least doubt that a man may, if he pleases, give a legacy to trustees, upon trust to apply it in erecting a monument to himself, either in a church or in a church yard, or even in unconsecrated ground, and I am not aware that such a trust is in any way invalid, although it is difficult to say who would be the cestui que trust of the monument. In the same way, I know of nothing to prevent a gift of a sum of money to trustees, upon trust to apply it for the repair of such a monument. In my opinion such a trust would be good, although the testator must be careful to limit the time for which it is to last, because as it is not a charitable trust, unless it is to come to an end within the limits fixed by the rule against perpetuities, it would be illegal. But a trust to lay out a certain sum in building a monument, and the gift of another sum in trust to apply the same to keeping that monument in repair, say for ten years, is, in my opinion, a perfectly good trust, although I do not see who could ask the Court to enforce it. If persons beneficially interested in the estate could do so, then the present plaintiff can do so; but if such persons could not enforce the trust, still it cannot be said that the trust must fail because there is no one who can actively enforce it.

Is there then anything illegal or obnoxious to the law in the nature of the provision, that is, in the fact that it is not for human beings, but for horses and dogs? It is clearly settled by authority that a charity may be established for the benefit of horses and dogs, and therefore the making of a provision for horses and dogs, which is not a charity, cannot of itself be obnoxious to the law, provided, of course, that it is not to last for too long a period. Then there is what I consider an express authority on this point in *Mitford v. Reynolds*. * * *

It is impossible to suppose that, from the beginning to the end of these proceedings, the question whether the gift was good or bad was never brought to the attention of all the learned judges before whom the case came. I do not indeed find that any formal discussion took place upon it. This may have been because all the parties

agreed upon the point, or it may have been disposed of by the judge in the course of the argument. But it is impossible to suppose that the matter was not fully present to the learned counsel who argued the case, or to the various judges before whom it came, and that they did not treat the gift as valid. The point must have been raised, because the fund out of which it was to take effect (if it were good) was given to a charity. It was the duty of the counsel for the Governor General and the East Indian Government to raise the point on behalf of the charity, if there was anything in it, because the charity would have taken so much more, if the provision for the horses were invalid. That being so, I think that I may treat that case as a decision by very high authority that such a provision is good, and, if I had felt any doubt about the point myself, I should have considered that authority as settling it, so far as I am concerned. There is nothing, therefore, in my opinion, to make the provision for the testator's horses and dogs void.

Then the next question is this: The gift is of an annuity of £750., during the lives and life (to put it shortly) of the horses and dogs, and the survivors or survivor of them, and of course a time would arrive when the provision which the testator thought right to make for all the animals would be much more than sufficient for the three or the two or the one which might survive. The annuity is to cease entirely when the last survivor dies, and it is obvious that nothing like that sum could or would be applied for the benefit of the animals when they became greatly reduced in number. The question is, whether the annuity was given for the trustees beneficially. In my opinion it was not given to them beneficially. * * *

I must, therefore, declare that the trustees do not take the surplus beneficially, but, upon the question whether the surplus belongs to the heir at law or to the devisee of the real estate, by reason of its not being raisable out of the estate. I say nothing in the absence of the heir at law.²

BOYLE v. BOYLE.

(In Chancery, before Vice Chancellor Hedges E. Chatterton, 1877. Ir. R. 11 Eq. 433.)

Suit to administer the assets of Daniel Boyle. Hearing on further consideration. By his will, dated the 26th of March, 1871, Daniel Boyle, the deceased, after several pecuniary bequests, devised and bequeathed the residue of his real and personal estate to his executors, upon the following trust: "upon trust that they shall apply the

² The gift was concededly not for a charitable purpose, yet it might last for 50 years, or more than 21 years after the death of all human beings in life at the decease of the testator.

residue of my estate to works of charity, such as masses for the eternal repose of my soul, and whatever else they may judge most charitable."

THE VICE CHANCELLOR. The next-of-kin of the testator contend that this gift is void for uncertainty. It would, of course, have been impossible to support this contention, but for the occurrence of the words pointing to masses, as otherwise there was an express general charitable intention which could be executed or controlled by this court. It has, however, been established by the case of *Attorney General v. Delaney* [Ir. R. 10 Eq. 104] that a legacy for masses is not a legacy for a charitable purpose in the sense in which this court considers gifts for charity. The testator consequently has shown that he does not use the expression "works of charity" in its legal acceptance, for, by his own interpretation of it, he extends it to a purpose not charitable. If the gift were valid, it would have been open to the executors to apply the whole subject of the gift to this purpose—that is to say, otherwise than for charity. I had occasion in the recent case of *Copinger v. Crehane* [Ir. R. 11 Eq. 429] to consider the authorities upon the subject of uncertain gifts not exclusively charitable, and I need only now say that, in my opinion, the rule is that when the purpose of a testamentary gift is uncertain, and the gift, if not charitable, would therefore fail, and it appears sufficiently that the legatee is not intended to take beneficially, but upon trust, it will be supported by this court, and carried out when the terms of the gift are such that the legatee is bound to apply it wholly to purposes specifically charitable; but that when there is a discretion given to the legatee to apply it to charitable purposes, and also to purposes not charitable, and the trust is indefinite, the gift fails, and the benefit of the trust results to the residuary legatees or next-of-kin, as the case may be. The question is not, as Sir William Grant says, whether the trustee may not apply it upon purposes strictly charitable, but whether he is bound so to apply it. Here, from the terms of the gift, the executors are at liberty to apply any part of it, or the whole of it, to purposes not charitable in the legal acceptance. It is not a case within the principle on which *Doyley v. The Attorney General* [4 Vin. Abr. 285] and *Salisbury v. Denton* [3 K. & J. 529] were decided, for it is not a gift to certain definite objects and to charitable purposes, in which case the subject of it may be divided between the two. Here, the executors were not bound to apply any part upon purposes strictly charitable and the trust is altogether of an indefinite character. I am, therefore, of opinion, that upon this ground the gift fails.

REICHENBACH v. QUIN.

(In the High Court of Justice, Chancery Division, Ireland, before Vice Chancellor Hedges E. Chatterton, 1888. L. R. 21, Ir. 138.)

Jane Cowley, by her will, dated the 30th October, 1881, devised and bequeathed all her property to the defendants, upon the trusts therein declared; and, after giving certain other directions in respect thereof, proceeded: "And whatever interest I have in the lands of Newcastle, County Dublin, and in the premises in Bridgefoot Street, Dublin, now forming a portion of Darcy's Brewery, I direct that the same shall be sold after my decease, if not previously disposed of, and out of the amount realized thereby, after payment of the expenses of such sale, I direct my trustees to apply £100. towards having masses offered up in public in Ireland for the repose of my soul and the souls of my father, mother, brother, and sisters, and of my servant Anne Hagerty, and apply the balance towards such charitable purposes in Ireland as my trustees shall select." And the testatrix appointed the defendants executors of her said will.

The testatrix died on the 16th June, 1882, and on the 24th July, 1882, probate of her will was granted to the defendants.

Anne Hagerty survived the testatrix.

An action was brought by certain legatees under the said will for the purpose of having the trusts thereof carried out and the personal estate of the testatrix administered, and a decree was, on the 4th March, 1885, made to that effect.

The case now came before the Court on further consideration of the Chief Clerk's certificate, and a question arose as to the validity of the bequest for masses.

THE VICE CHANCELLOR. I am of opinion that there is no attempt to create a perpetuity by the trust in reference to the £100. for masses. There is a direction in the will that the lands of Newcastle and the testatrix's premises in Bridgefoot Street should be sold, and that out of the amount realized her trustees should apply £100. towards having masses offered up in public in Ireland for the repose of her soul and the souls of the other persons mentioned.

I do not consider that there is any attempt here to create a perpetuity, and on that ground—and I wish it be understood that on that point only I give a decision—I shall declare that the gift is valid.¹

¹ The Vice Chancellor seems to have overlooked the ground of his decision in *Boyle v. Boyle*, supra, p. 84.

FESTORAZZI and Others v. ST. JOSEPH'S CATHOLIC CHURCH OF MOBILE and Others.

(Supreme Court of Alabama, 1894. 104 Ala. 327, 18 South. 394, 25 L. R. A. 360, 53 Am. St. Rep. 48.)

Appeal from the chancery court of Mobile.

The bill was filed by the appellants, Sylvester Festorazzi and Amabile Muscat, as executors of the estate of Joseph Peter, deceased, and prayed to have the will of their testator construed, and to be directed as to how to distribute the estate.

The second and third items of the will were as follows: "Second. I give and bequeath to the Roman Catholic Cathedral in the city of Mobile, the sum of three thousand dollars, the same to be used in solemn masses for the repose of my soul." "Third. I give and bequeath to the Roman Catholic Church of Saint Joseph in the city of Mobile, the sum of two thousand dollars, also to be used in solemn masses for the repose of my soul." The Catholic Cathedral made no answer to the bill, and a decree pro confesso was entered against it.

The St. Joseph's Catholic Church answered the bill, and filed a cross-bill, setting up its claim to the legacy of two thousand dollars bequeathed to it by the will. To the cross-bill of the St. Joseph's Catholic Church the executors demurred, on the ground that the said St. Joseph's Catholic Church of Mobile was not entitled to the relief prayed for in said cross-bill against the said executors, because it does not appear from said cross-bill that the complainant therein is entitled to the enforcement of said legacy under the laws of Alabama. This demurrer was overruled.

On the final submission of the cause, the Chancellor decreed that the bequest made to the said St. Joseph's Catholic Church of Mobile was a legal and valid bequest and directed that the executors pay the same out of the money in their hands belonging to the testator's estate. The executors appealed from this decree, and assigned the same as error.

HEAD, J. The validity of the bequest brought to our view, in this case, must be upheld, if at all upon one of three propositions, viz.:

1. That it is a direct bequest to the church for its general uses.
2. That it creates a charitable use.
3. That it creates a valid private trust.

[The court held the first and third propositions to be untenable.]

Third: It is not valid as a private trust, for the want of a living beneficiary. A trust in form, with none to enjoy or enforce the use, is no trust. Argument is unnecessary to show that there is no imaginable being possessing power to enforce the use declared in this bequest. The executor cannot do it, for he succeeds only to the property rights of the testator. His powers and functions do not, and can-

not, extend to the well being of the soul of his testator. As said by appellants' counsel, "If the church should recover this bequest and apply it to paying its debts, repairing its building, supporting its priests and paying the expenses of their ceremonies, the purpose of the bequest would be clearly violated. But what living person is authorized to call the trustee to an account for the misuse of the fund?" Reversed and remanded.¹

BRICKELL, C. J., dissenting.

ROSS and ROSS v. DUNCAN and Others.

(Superior Court of Chancery of Mississippi, before Chancellor Robert H. Buckner, 1839. 1 Freem. Ch. 587.)

THE CHANCELLOR. The complainants bring this suit as the heirs and distributees of Margaret A. Reed, deceased. The allegations of the bill, so far as the demurrer is concerned, are:

That Mrs. Reed, about the 14th June, 1838, made her last will and testament, appointing the defendants her executors, to whom she devised and bequeathed the most of her estate, consisting in part of a large number of negro slaves; that said devises and bequests were made upon the secret trust and confidence that the negroes should be taken by the defendants as the executors of the will to Liberia, there to remain free, etc. A letter from the testatrix of even date with the will is referred to in the bill, which it is alleged is declarative and expressive of the secret trust aforesaid. It is alleged that this secret trust is in violation of the laws of Mississippi, and was intended to evade and defraud the statute which prohibits the emancipation of slaves by last will and testament, except under the restrictions therein enumerated. The complainants pray that the will be set aside, that the estate may be decreed to them, etc. To this bill there is a general demurrer, which at once presents the question of the validity of the will as coupled with the alleged secret trust. If the trust be an illegal one, it can make no difference whether it be tacit or express; the same consequences must follow it in either character. I shall therefore elect to consider the will as having upon its face a devise and bequest to the defendants upon the express trust that the negroes therein mentioned should be taken to Liberia, there to remain free. Several collateral questions were made on the argument, all of which it is believed resolve themselves into

¹ See *Holland v. Alcock*, 108 N. Y. 312, 322-324, 16 N. E. 305, 2 Am. St. Rep. 420 (1888); *O'Connor v. Gifford*, 117 N. Y. 275, 280, et seq., 22 N. E. 1036 (1889).

In England a trust for saying masses is void as a trust for a superstitious use. *West v. Shuttleworth*, 2 Myl. & K. 684, 697 (1835).

A trust for saying masses is not regarded as a trust for a charitable use except in Massachusetts, *Schouler, Petitioner*, 134 Mass., 426 (1883); and Pennsylvania, *Rhymer's Appeal*, 93 Pa. 142, 39 Am. Rep. 736 (1880).

this plain and broad proposition: Is a will made within this State, by one of its citizens, in which negro slaves are bequeathed upon the trust that they shall be taken to Liberia, on the coast of Africa, there to remain, void, as being in fraud and violation of our laws, and in contravention of their policy upon the subject of domestic slavery? * * *

It is difficult to conceive how an act done in Liberia, according to its laws, should involve a violation of those of this State. The rule that every contract, act, or agreement is to be governed by the laws of the place where the execution or performance is to take place, is one of universal application. The execution of the trust in this case, according to the allegations of the bill, is to take place in Liberia. The laws of that place, then, according to the rule, must decide upon its legality. The ground was taken, that, as the negroes for whose benefit the trust was raised, can maintain no suit in our courts to enforce it, and there being no one who can enforce it, the trust, it is insisted, is therefore void. The conclusion does not necessarily follow from the premises. A trust may be created which may be perfectly consistent with the law, and yet the law may have pointed out no mode of enforcement; still it would not interpose to prevent it, but would leave its execution to the voluntary action of the trustee. A person may convey his property upon what trust or condition he pleases, so that it be not against law; and the Court would only interfere at the instance of the heirs or distributees of the grantor or testator, when there had been a failure or refusal to perform the condition or trust. These principles, I think, are plainly deducible from the case in *Philadelphia Baptist Ass'n v. Hart*, 4 Wheaton, 35, 4 L. Ed. 499. * * *

The demurrer must be sustained and the bill dismissed.¹

¹ See *Hooper v. Hooper*, 32 Ala. 669 (1858); *Cleland v. Waters*, 19 Ga. 35 (1855).

Prof. Gray calls attention to the fact that in all the slaveholding states (save Louisiana, in which the civil law prevailed), except Alabama, Georgia, and Mississippi, a slave had a standing in court to enforce his emancipation.

WHO MAY BE A CESTUI QUE TRUST. In almost all jurisdictions any person, artificial or natural, may at this day be a cestui que trust. Formerly aliens and slaves were exceptions to this rule.

(1) *Aliens*. An alien could take, but could not hold, as cestui que trust, where the trust res was real estate. The sovereign became at once entitled to the benefit of the trust, and could enforce its rights in a court of equity. *Barrow v. Wadkin*, 24 Beav. 1 (1857); *Hubbard v. Goodwin*, 3 Leigh (Va.) 492 (1832). Where the trust res was personalty, there never was any objection to an alien taking and holding as cestui que trust. *Craig v. Leslie*, 3 Wheat. 563, 4 L. Ed. 460 (1818).

(2) *Slaves*. A slave could not be a cestui que trust. *Haywood v. Craven*, 2 Law Repos. (N. C.) 557 (1816); *Cunningham v. Cunningham*, Taylor & Conference (N. C.) 353 (1801). The trust was void, and the trustee became a constructive trustee for the creator of the trust or his representative. *Craig v. Beatty*, 11 S. C. 375 (1878).

SECTION 7.—THE TRUSTEE.

PRESIDENT AND FELLOWS OF YALE COLLEGE and Others.
(Supreme Court of Errors of Connecticut, 1896. 67 Conn. 237, 34 Atl. 1036.)

Appeal from probate.

Philip Maret left a will by which he devised property to trustees and provided that, after the death of his wife and daughter, the remainder of the trust property should be distributed to seven different legatees. One of the legacies was in these words: "One-tenth part to the State of Connecticut, in trust, the income to be applied toward the maintenance of any institution for the care and relief of idiots, imbeciles or feeble-minded persons."

The will contained this provision: "Should any of the trusts not be accepted the amount intended therefor shall be proportionately distributed in augmentation of such as may be accepted."

The State refused to accept the trust. The trustees then applied to the Probate Court to appoint a trustee in place of the State. The Probate Court made an order appointing a trustee. Yale College and the other legatees appealed therefrom to the Superior Court of New Haven county and that court reserved the case for the consideration of the Supreme Court.

HAMERSLEY, J.¹ The testator has named a trustee competent to accept the trust. The State has power to accept a gift in trust to apply the income thereof towards the maintenance of some institution for the care and relief of idiots. The maintenance of such an institution, either directly under immediate State supervision, or indirectly through annual aid given to an existing institution, is a lawful exercise of governmental power and duty. * * * A gift to the State in trust to apply the same in executing a lawful governmental function, is a valid gift. Whatever may be thought of the policy of accepting such gifts, there can be no doubt of the power of the State to accept or refuse. The State has refused to accept the trust in question; and the plain language, as well as the clear intent of the will, require the trustees to distribute the amount intended for such non-accepted trust proportionately in augmentation of the trusts that have been accepted. There is nothing equivocal in the language: nothing doubtful as to the intent. There is no occasion for construction.

[The court advised the Superior Court to render judgment reversing the order of the Probate Court.]²

¹ Part of the opinion is omitted.

² Had the state been incompetent to act as trustee, the order appealed from would have been proper. *Dailey v. City of New Haven*, 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69 (1891).

Compare *Shoemaker v. Board of Commissioners of Grant County*, 36 Ind.

ATTORNEY GENERAL v. LAUNDERFIELD.

(In Chancery, before Lord Chancellor Hardwicke, 1743. 3 Swanston, 416.)

Note, in this case the Attorney-General argued, that as corporations could not be seized to an use at law, no more could they be trustees, but should have the lands to their own use, divested and freed from the trust. 1 Co. 122a. Chudleigh's Case.

But the Chancellor would not let him go on; nothing being clearer than that corporations can be trustees.¹

OWNES v. OWNES and Others.

(Court of Chancery of New Jersey, 1872. 23 N. J. Eq. 60.)

THE CHANCELLOR [ABRAHAM O. ZABRISKIE].² This suit is by the complainant, against the widow and heirs of her deceased son, James H. Ownes, for the conveyance of certain lands in the city of New Brunswick, held by her son in trust for her, as she alleges. These lands were conveyed by her to her son by deed dated May 21st, 1855, and by a declaration of trust, bearing date on the same day, executed by James H. Ownes, under his hand and seal, attested by a subscribing witness, were declared to be held in trust for the complainant,

175, 184 (1871); Bedford v. Bedford, 99 Ky. 273, 290, 35 S. W. 926 (1896); Pinson v. Ivey, 1 Yerger (Tenn.) 296, 309, 324-326 (1830).

The statement that the crown or a state cannot be a trustee means no more than that the cestui cannot compel performance of the trust by bill in equity. "The king shall not be seized to another's use, because he is not compellable to perform the confidence." Dillon v. Fraine, Popham, 70, 72.

The cestui's proper course is to sue by petition—in England, to the crown; in this country, to Congress or the Legislature.

A grantee of the sovereign takes subject to the trust. Winona & St. Peter R. Co. v. St. Paul & Sioux City R. Co., 26 Minn. 179, 2 N. W. 489 (1879); Pinson v. Ivey, 1 Yerg. (Tenn.) 296 (1830).

The state's title to the property, and consequently the cestui's claim, will be barred by the statute of limitations, as if a private individual had been trustee. Miller v. State, 38 Ala. 600 (1863); Molton v. Henderson, 62 Ala. 426, 434 (1878).

¹ In Dillon v. Fraine, Popham, 70, 72, the reason why a corporation could not be seized to a use was stated to be "because it is a dead body, although it consist of natural persons; and in this dead body a confidence cannot be put, but in bodies natural."

In Webb v. Neal, 5 Allen (Mass.) 575 (1863), the court appointed the city of Salem, Mass., a testamentary trustee in place of persons declining to act.

It was held, in In re Franklin's Estate, 150 Pa. 437, 24 Atl. 626, 30 Am. St. Rep. 817 (1892), that the city of Philadelphia could not be a trustee of a purely private trust. In Gloucester v. Osborn, 1 H. L. Cas. 272, 285 (1847), Lord Lyndhurst expressed the opinion that a municipal corporation might take property in trust for the benefit of individuals and for purposes altogether private. See remarks of Sharswood, J., on this statement in Philadelphia v. Fox, 64 Pa. 169 (1870). Compare Higginson v. Turner, 171 Mass. 586, 51 N. E. 172 (1898), and City of Boston v. Doyle, 184 Mass. 373, 68 N. E. 851 (1903).

² Part of the opinion is omitted.

and on the agreement to convey the same to her or any person whom she should appoint. It concluded with these words: "It being clearly understood by me that I merely hold the said property in trust for said purpose, and that I have no property or interest therein, except as such trustee." * * *

The declaration if valid vested the beneficial title to the land in the complainant as cestui que trust, and left the bare legal estate in James as trustee, and upon his dying intestate, the legal estate vested in his heirs or heir-at-law. The suit is against his widow and his three children—two daughters and one son, all infants—for a conveyance of the property to the complainant as the cestui que trust. * * *

But James, at the time of this conveyance and declaration of trust, was an infant, only nineteen years of age. The conveyance or declaration of trust by an infant, by a deed actually delivered, is voidable, but not void. This was so held by Lord Mansfield, in *Zouch v. Parsons*, 3 Burr. 1794. He held a deed of bargain and sale delivered by an infant voidable, and not void. * * *

An infant, after coming of age, may by his acts, confirm a voidable deed. Many acts of James, after his majority, recognizing the fact that he held this property in trust for his mother, are shown. He took her directions about fencing and repairing it. He collected the rents and paid them to her. He mortgaged the property for her benefit, and acknowledged, repeatedly that he held it in trust for her. I think the evidence is amply sufficient to show that he confirmed this deed by his act for years after he came of age. * * *

The trust being thus established, the complainant is entitled to a decree that the defendants, the widow and children of James, convey to her the legal estate.²

BROOK v. BROOK.

(In Chancery, before the Master of the Rolls, Lord Langdale, 1839. 1 Beavan, 531.)

In this case new trustees were to be appointed.

Mr. Stinton asked that Miss B. might be at liberty to propose herself as trustee before the Master.

THE MASTER OF THE ROLLS declined, saying that it was not the usual practice, and it might lead to inconvenience in case of her marriage, when her husband would have the power of interfering with the trust.³

² See *Jevon v. Bush*, 1 Vern. 342 (1685).

³ An unmarried woman was appointed trustee in *In re Campbell's Trust*, 31 Beav. 176 (1862), and *In re Barkley*, L. R. 9 Ch. App. Cas. 720 (1874). In *In re Dickinson's Trusts*, Wkly. Notes — (1892), in appointing an unmarried woman a trustee, Farwell, J., said that the position of women had consider-

In re PARROTT.

(In Chancery, before Vice Chancellor, Sir Charles Hall, 1881. Wkly. Notes [1881] 158.)

This was a petition for the appointment of new trustees of a will, on the hearing of which, a short time since the Court had declined to appoint one of the proposed new trustees upon the ground that he was the husband of a feme covert, who was entitled under the will to property for her separate use during her life. All the beneficiaries under the will who were in existence, except one, who was out of the jurisdiction (service upon whom had been dispensed with) were co-petitioners, and the husband of the feme covert was a respondent.

Gayer, for the petitioners now mentioned the petition again, and produced evidence that all endeavors to procure another trustee instead of the husband had been unsuccessful, and that it was the desire of the wife that the husband should be appointed, and stated that the husband would give an undertaking that in case he at any time became a sole trustee he would appoint another trustee to act with him.

Latham, for the respondents, did not oppose.

THE VICE CHANCELLOR made an order appointing the husband a trustee as prayed, directing that in the case he should become sole trustee a new trustee should forthwith be appointed, and that if necessary an application in chambers must be made for that purpose.¹

CURRAN v. GREEN and Wife.

(Supreme Court of Rhode Island, 1893. 18 R. I. 329, 27 Atl. 596.)

Bill in equity for the removal of a trustee and an injunction.

John Curran by his will directed his executor to sell his real estate and such of his personal property as his wife might not choose to keep, and, after paying all his debts and expenses, to transfer the residue to his daughter, Sarah Green, in trust to pay certain annuities and in a certain event he gave the rest and residue of his estate to her subject to certain payments.

PER CURIAM. While the court would be reluctant to appoint a married woman or a cestui que trust as a trustee, it is a very differ-

ably altered since *Brook v. Brook* was decided. He had frequently appointed unmarried women in chambers. See *Gibson's Case*, 1 Bland, Ch. 138, 17 Am. Dec. 257 (1827).

¹ *In re Hattat*, 18 W. R. 416 (1870); *In re Davis' Trusts*, L. R. 12 Eq. Cas. 214 (1871); *Milbank v. Crane*, 25 How. Prac. 193 (1863).

It was formerly the rule in South Carolina not to appoint the husband of a cestui que trust a trustee, either alone or with others. *Ex parte Hunter, Rice*, Eq. (S. C.) 293 (1839); *Dean v. Lanford*, 9 Rich. Eq. (S. C.) 423, 427 (1857).

An appointment by a cestui que trust of her husband as trustee under a power of appointment has been held valid. *Tweedy v. Urquhart*, 30 Ga. 446 (1860); *Stearns v. Fraleigh*, 39 Fla. 603, 23 South. 18, 39 L. R. A. 705 (1897).

ent matter to remove a trustee from office on account of these disqualifications which do not absolutely render a person incapable of acting as a trustee. The respondent, Mrs. Green, was appointed trustee under the will of her father, John Curran, by the testator himself, because of the confidence he felt in her capacity and honesty. So far as appears she has done nothing to show that she is not competent to perform the duties of the trust or that the trust estate will not be safe in her hands. There is, therefore, no sufficient ground to warrant her removal from the trust, especially as she offers to furnish a satisfactory bond to secure the faithful performance of the trust.¹

KING v. BOYS and Another.

(In the Court of Queen's Bench, 1569. 3 Dyer, 283b.)

One T. King enfeoffed one Joseph Boys, an alien and Forcet of Gray's Inn, to the use of himself and his wife in tail, remainder to his right heirs. Whether the Queen be entitled to a moiety of the land immediately, or not, was the question. And it seems that if an office be found of it, the Queen shall have the moiety by her prerogative to her own use, and the other use in this moiety is gone forever.²

¹ In *Milbank v. Crane*, 25 How. Prac. 193 (1863), a married woman was appointed trustee by the court.

A married woman may be a trustee for her own husband. Resulting trusts: *Milner v. Freeman*, 40 Ark. 62 (1882); *Pool v. Phillips*, 167 Ill. 432, 47 N. E. 758 (1897); *Darrier v. Darrier*, 58 Mo. 222 (1874); *Persons v. Persons*, 25 N. J. Eq. 250 (1874). Express trust: *Moore v. Cottingham*, 90 Ind. 239 (1883).

At common law a married woman, who was a trustee, was under the same disabilities in conveying title to the trust property as in conveying title to property held in her own right. *Co. Lit.* 112a, Hargrave's note 6; 1 Fonbl. Eq. 92; *Dundas v. Biddle*, 2 Barr (Pa.) 160 (1845).

The husband had to be joined as plaintiff in suits by her and as defendant in suits against her. *Still and Wife v. Ruby*, 35 Pa. 373 (1860); *People v. Webster*, 10 Wend. (N. Y.) 555 (1833); *Kingsman v. Kingsman*, L. R. 6 Q. B. D. 122, 128 (1880).

The husband was liable for breaches of the trust committed by his wife during coverture. *Phillips v. Richardson*, 4 J. J. Marsh. (Ky.) 212 (1830); *U. S. Trust Co. v. Sedgwick*, 97 U. S. 304, 309, 24 L. Ed. 954 (1877).

In England and generally in the United States the disabilities of married women have been removed by legislation, and they can now act as freely as unmarried women, and their husbands are no longer liable for their breaches of trust. See *Claussen v. La Franz*, 1 Iowa, 226 (1855).

² This was a trust of realty. The alien trustee's title to realty was good against all except the sovereign, and he could convey a title good as to all except the sovereign. *Ferguson v. Franklins*, 6 Munf. (Va.) 305 (1819). His transferee's title would be no better against the sovereign than his own. *Fish v. Klein*, 2 Mer. 431 (1817).

In England and most jurisdictions in the United States the disability of aliens to hold real estate has been removed. In *In re Hill*, W. N. (1874) 228, aliens were appointed trustees of real estate situated in England.

An alien is capable of taking and holding personal property in trust. *Lewin, Trusts* (8th Ed.) 40; *Perry, Trusts* (5th Ed.) § 56; *Kerr v. White*, 52 Ga. 362, 369 (1874).

WOODRUFF v. WOODRUFF and Others.

(Court of Chancery of New Jersey, 1888. 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380.)

Patrick Woodruff died in December, 1886, leaving a daughter, Louisa C. Woodruff, his only child, him surviving. By his will he devised to Charles P. Stratton a farm called "Oaklands" in trust for the use and benefit of his said daughter and her issue. Stratton died in the testator's lifetime.

THE CHANCELLOR [ALEXANDER T. MCGILL]. As Mr. Stratton, to whom the lands were devised in trust, died before the testator, the title to the farm descended to Louisa C. Woodruff as heir at law of her father, Patrick, but charged with the trust established by the will. Lewin on Trusts (8th Ed.) 833; Perry on Trusts, § 38. From the character of that trust, it seems to me that a trustee should now be appointed in the place of Mr. Stratton. I will order a reference to a Master, to ascertain who will be a fit and proper person to receive the appointment, and what security the person selected should be required to give.

VARNER'S Appeal.

(Supreme Court of Pennsylvania, 1875. 80 Pa. 140.)

Appeal from the Orphans' Court of Allegheny county.

Appeal from the decree of distribution of the estate of Thomas McClurg, deceased.

By his will, dated March 13, 1873, the deceased gave, devised and bequeathed one third part of the residue of his estate to his sister, Matilda C. Varner, wife of Melchor Varner, for her sole and separate use, and so that her said husband shall not have any control over or use of the same, her heirs and assigns forever. He named his sister, Mary Ann McClurg, sole executrix.

Upon the settlement of the account of the executrix she had, as residuary estate, \$19,335.24 for distribution. Mrs. Varner claimed that she was entitled to receive her share without the intervention of a trustee.

The Orphans' Court ordered her share paid to a trustee to be thereafter appointed. Mrs. Varner appealed to the Supreme Court.

PER CURIAM. It is very clear that the will of Thomas McClurg gives to Mrs. Varner an estate for her sole and separate use, in the residuary estate, free from any control over or use of the same by her husband. Her husband being alive, this created a trust in equity to preserve the estate for her separate use, so that its control could not be exercised by her husband. Though no trustee was named, equity will raise one, in order to effectuate the intention of the tes-

tator. Hence, it was the duty of the Orphans' Court, which proceeds according to the principles of equity, to preserve the use by providing that the estate should not be paid into her own hands, and thereby enable her to dispose of it contrary to the trust.

Decree affirmed.

LORING and Another v. HILDRETH and Others.

(Supreme Judicial Court of Massachusetts; 1898. 170 Mass. 328, 49 N. E. 652, 40 L. R. A. 127, 64 Am. St. Rep. 301.)

Bill in equity to remove a cloud upon the title to certain land in Salem.

Hearing before Holmes, J., who, at the request of the parties, reported the case for the consideration of the full court.

ALLEN, J.¹ This is a bill in equity to remove a cloud upon the title to land in the possession of the plaintiffs who claim to be the owners thereof. The cloud consists in the record of a deed of trust from the late George B. Loring to the late John A. Loring, in trust, "during the life of Anna S. Loring, wife of said George B. Loring, and of Sally P. Loring, the daughter of said George B. Loring, to pay over to them one half part to each of the net rents and profits thereof; and at the death of either of them, the said Anna S. or Sally P. Loring, to convey her one half share in the said estate to her heirs at law, or to make such disposition of it as she shall direct by will." There were further provisions, not now material. This deed was signed and put on record by said George B. Loring, and it was also signed by said Anna S. Loring, to release dower and homestead, but it was never accepted by the grantee, and, upon the facts found at the hearing, it was never delivered. * * *

It is also contended by the defendants, that, although the deed of trust was never delivered, still the execution and recording of it by Mr. Loring amounted to a sufficient declaration of trust. It is conceded that, under the late English cases, there was no sufficient declaration of trust to be enforced against Mr. Loring, or persons deriving title from him. *Milroy v. Lord*, 4 De G. F. & J. 264. *Richards v. Delbridge*, L. R. 18 Eq. 11. *Moore v. Moore*, L. R. 18 Eq. 474. *In re Breton's Estate*, 17 Ch. D. 416. *Re Shield*, 53 L. T. (N. S.) 5. *Bottle v. Knocker*, 46 L. J. Ch. 159. *Ex parte Todd*, 19 Q. B. D. 786. But it is contended that these decisions proceed upon too narrow a ground, and that, although the trust deed of Mr. Loring shows no intention to make himself a trustee, and although there was no valuable consideration, yet that he intended to affect the property with a trust, and that this intention ought to be carried out. The answer to this view is, that the deed shows no intention

¹ Part of the opinion is omitted.

to create a trust, except in the manner provided. If his intention could not be carried out *modo et forma*, then so far as appears, there was no intention. The trust failed, because there was no intention to create one, which can be carried out. It often happens that charitable trusts fail because they cannot be carried out in the mode intended, if there was no intention that they should be carried out in any other mode. See *Teele v. Bishop of Derry*, 168 Mass. 341, 47 N. E. 422, 38 L. R. A. 629, 60 Am. St. Rep. 401, and cases there cited. So here. The deed shows no intention outside of the mode and form adopted by the deed; and this fails, because the deed itself was never delivered. In *Adams v. Adams*, 21 Wall. 185, 22 L. Ed. 504, the court resorted to testimony outside of the deed itself to ascertain the grantor's intention, and there found an intention to create a trust. If resort were had in the present case to outside circumstances, no support is found for the view that the grantor intended to create a trust independently of the deed. Numerous decisions from other States are cited for the plaintiff, which confirm us in the view, that we should not undertake to complete and carry out the trust, which the donor himself clearly abandoned.

Decree for the plaintiffs.²

SECTION 8.—NOTICE TO THE CESTUI QUE TRUST.

BATH SAVINGS INSTITUTION v. HATHORN, Administrator, and Another.

(Supreme Judicial Court of Maine, 1895. 88 Me. 122, 33 Atl. 836, 32 L. R. A. 377, 51 Am. St. Rep. 382.)

This was a bill of interpleader brought by the Bath Savings Institution against the defendant Hathorn, as administrator of the estate of Henry Walker, deceased, and Alice B. Files, to determine the title to a certain deposit in that institution.

Henry Walker died October 2, 1891. On July 1, 1882, he deposited \$700 in the Bath Savings Institution in his own name, but "in trust for Alice B. Files" and took out a depositor's book in that form. He retained possession of the bank book till his death, never drew any part of the principal or interest, but took the book to the bank occasionally to have the accrued dividends added. He never informed Alice B. Files of the deposit; but informed at least two other

² See *Adams v. Adams*, 21 Wall. 185, 22 L. Ed. 504 (1874), and *King v. Donnelly*, 5 Paige (N. Y.) 46 (1835).

persons of the deposit, one of whom informed Alice B. Files of the same.

HASKELL, J.¹ *Ray v. Simmons*, 11 R. I. 266, 23 Am. Rep. 447, is in point. One Bosworth deposited money in a savings bank in his own name as trustee for a step-daughter. He did not tell her what he had done, nor show her the pass book. He kept that himself. After his death the court held that the step-daughter was entitled to the money—that the transaction constituted a trust in her favor.

So is *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446.¹ Susan Boone deposited \$500 in a savings bank "in trust for Lillie Willard." Susan kept the pass book and Lillie had no knowledge of it until after Susan's death. Want of notice to Lillie and the retention of the pass book by Susan were urged in defense; but the court held a gift in trust complete. This is an exhaustive case, and contains a review of authorities by Chief Justice Church prior to 1878.

So is *Minor v. Rogers*, 40 Conn. 512, 16 Am. Rep. 69. A widow deposited \$250 in her own name "as trustee of William A. Minor," the child of a neighbor. The child knew nothing of the deposit until after the depositor's death, and meantime did not have possession of the pass book, and the court held the trust complete, and allowed a recovery of the money from the depositor's executor.

So is *Re Gaffney's Estate*, 146 Pa. 49, 23 Atl. 163. It appeared that Hugh Gaffney deposited \$560 in his own name as trustee for Polly Kim, and the court held the entry itself *prima facie* evidence of the trust, and, unexplained sufficient to uphold it.

In *Gerrish v. New Bedford Institution*, *supra* [128 Mass. 159, 35 Am. Rep. 365], the court says: "No particular form of words is required to create a trust in another, or to make the party himself a trustee for the benefit of another; that it is enough for the latter purpose if it be unequivocally declared in writing—or orally if the property be personal—that it is held in trust for the person named; that when the trust is thus created it is effectual to transfer the beneficial interest and operates as a gift perfected by delivery."

The same case holds that notice to the beneficiary is unnecessary where the transaction is clear, but when ambiguous, or susceptible of different interpretations, it removes the doubt and is decisive of the purpose of the donor. Some of the earlier Massachusetts cases seem to hold notice to the beneficiary essential to the validity of a trust, but when considered in the light of this case, rather consider the notice a controlling than an essential element in the creation of a voluntary trust. The prevailing doctrine now is that notice is unnecessary, but when shown has controlling effect.

In this case the entry, "in trust for," is of clear and unmistakable import and sufficient to create a *prima facie* trust. It might have been controlled by evidence that would have shown a contrary inten-

¹ Part of the opinion is omitted.

tion, but such evidence is wholly wanting. Moreover, all the declarations, acts and conduct of the donor are consistent with the presumption arising from the entry itself, and show it expresses the true import of the transaction and creates a completed trust in favor of the donee.

Decree accordingly.

SECTION 9.—THE STATUTE OF FRAUDS.

STATUTE 29 CHARLES II, CHAPTER 3, SECTIONS 7, 8,
AND 9, 1676.

8 Statutes at Large, 406.

VII. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June all declarations or creations of trusts or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

VIII. Provided always, That where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made; anything hereinbefore contained to the contrary notwithstanding.

IX. And be it further enacted, That all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be wholly void and of none effect.¹

¹ AMERICAN STATUTES.—The seventh section of the English statute has either been declared in force or in substance enacted in the following jurisdictions:

Arkansas.—Kirby's Digest of Statutes (1904) § 3666.

District of Columbia.—Same as Maryland, of which it was once part.

Florida.—General Statutes (1906) § 2452.

Illinois.—Hurd's Revised Statutes (1906) c. 59, § 9.

Maryland.—Alexander's British Statutes (1870) p. 546.

Missouri.—Revised Statutes (1899) § 3416 (Ann. St. 1906, p. 1949).

New Jersey.—General Statutes (1709-1895) vol. 2, p. 1603, § 3.

New York.—Laws 1896, p. 592, c. 547, § 207.

Pennsylvania.—Stewart's Purdon's Digest (1905) pp. 1757, 1758, § 3.

Rhode Island.—The English statute of frauds was declared in force in Rhode Island by an act of 1749. See 16 R. I. 584, 586. See, also, General

A question of fraud, that is, whether the trust was really created at the time of the execution of the instrument, or deed, to which the manifestation of the trust refers, is always an open question. Sup-

Laws of R. I. (1896) c. 202, § 2, declaring certain declarations of trust of land void as to certain persons unless acknowledged and recorded.

South Carolina.—Civil Code (1902) p. 990, § 2583.

In the following jurisdictions trusts of land must be "created *or* declared" in writing:

California.—Civil Code (1906) § 852.

Georgia.—Civil Code (1895) § 3153.

Maine.—Revised Statutes (1903) c. 75, § 14.

Massachusetts.—Revised Laws (1902) c. 147, § 1.

Montana.—Civil Code (1895) § 1311.

New Hampshire.—Public Statutes (1901) c. 137, § 13.

South Dakota.—Civil Code (1903) § 302.

Vermont.—Public Statutes (1906) c. 121, § 2583.

In the following jurisdictions trusts must be "created *or* declared by deed or conveyance in writing":

Colorado.—Mills' Annotated Statutes (1891) § 2019.

Michigan.—Compiled Laws (1897) p. 2902, § 6.

Minnesota.—Revised Laws (1905) c. 68, § 3487.

Nebraska.—Cobbey's Annotated Statutes (1907) vol. 2, § 6022.

Nevada.—Cutting's Compiled Laws (1900) § 2694.

New York.—Laws 1896, p. 592, c. 547, § 207.

Utah.—Compiled Laws (1907) tit. 77, § 2461.

Wisconsin.—Sanborn & Berryman's Annotated Statutes (1898) c. 104, § 2302.

In the following jurisdictions trusts must be "created *or* declared by a conveyance or other instrument in writing":

Alaska.—Carter's Annotated Alaska Codes, Code of Civil Procedure, § 1046.

California.—Code of Civil Procedure (1906) § 1971.

Idaho.—Civil Code (1901) § 2400.

In the following jurisdictions trusts must be "created" or "created *and* declared" in writing:

Alabama.—Code (1907) § 3412.

Indiana.—Horner's Annotated Statutes (1901) § 2969.

Kansas.—Dassler's General Statutes (1901) § 7875; General Statutes (1905) § 8612.

Oregon.—Bellinger & Cotton's Annotated Codes & Statutes (1902) vol. 1, c. 9, § 793.

In one jurisdiction "declarations or creations of trusts * * * must be executed in the same manner as deeds of conveyance":

Iowa.—Annotated Code (1897) § 2918.

In one jurisdiction declarations or creations of trusts must be made and manifested by writing, and the writing must be acknowledged or proved as other writings, and must be lodged for record with the clerk of the chancery court of the proper county, to be recorded and to take effect only from the time of being lodged for record:

Mississippi.—Code (1906) § 4780.

In the following jurisdictions there is no statute making a writing essential to the validity of a trust of land:

Arizona
Connecticut
Delaware
Kentucky
New Mexico
North Carolina
Ohio

Oklahoma
Tennessee
Texas
Virginia
West Virginia
Wyoming

In these jurisdictions trusts of land, it would seem, may be both created and manifested and proved orally. This view prevails in most of them.

The decisions to the contrary in Connecticut and Kentucky are indefensible. Dean v. Dean, 6 Conn. 285 (1826); Chiles v. Woodson, 2 Bibb (Ky.) 71 (1810).

In North Carolina a trust created after the analogy of a feoffment to uses

pose a judgment, or some other lien, had attached to the property in the interval between the execution of the deed and the declaration of trust, it would have been necessary in order to defeat such lien, to show that the trust was bona fide created at the time of the execution of the deed. This, however, might be done by parol; because the statute does not require that the trust should be created, but only manifested in writing. * * * It was this principle—that a declaration of trust might have a retroactive effect, and refer back to the time when the trust was created—that was decided by Lord Cowper,

may be both created and manifested and proved orally. *Shelton v. Shelton*, 5 Jones, Eq. (N. C.) 292 (1859). But a trust created after the analogy of a bargain and sale, or a covenant to stand seised, must be created by deed. *Pittman v. Pittman*, 107 N. C. 159, 12 S. E. 61, 11 L. R. A. 456 (1890).

In West Virginia a trust in favor of a third person may be both created and manifested and proved orally; but if created in favor of a grantor it must be manifested and proved by writing. *Troll v. Carter*, 15 W. Va. 567 (1879).

When a trust of land need not be created, but only "manifested and proved," by writing, it may be established by a subsequent admission of the trust contained in any writing signed by the party to be charged. *Forster v. Hale*, 3 Ves. Jr. 696, 707 (1798). This case is followed wherever the seventh section of the English statute or its equivalent is in force.

Statutes requiring a trust of land to be "created or declared" in writing have received a like interpretation. *McClellan v. McClellan*, 65 Me. 500 (1876).

So, when a trust of land must be "created or declared by a deed or conveyance in writing," the deed or conveyance may be made subsequent to the creation of the oral trust. *Wright v. Douglass*, 7 N. Y. 564 (1853).

When a trust of land must be "created" or "created and declared" in writing, a subsequent admission in writing would seem insufficient. In *Richardson v. Woodbury*, 43 Me. 206, 212 (1857), the court so decided, interpreting the statute of that state then in force. The contrary was decided in *Gaylord v. Lafayette*, 115 Ind. 423, 428, 17 N. E. 899 (1888). The question was left undecided in *Patton v. Beecher*, 62 Ala. 579, 587 (1878). See *Bibb v. Hunter*, 79 Ala. 351, 356 (1885); *Wiggs v. Winn*, 127 Ala. 621, 29 South. 96 (1900).

As the subsequent writing operates by way of admission, it makes no difference with what intention it is made. *Bates v. Hurd*, 65 Me. 180 (1876); *McClellan v. McClellan*, 65 Me. 500 (1876). Arguing by analogy from the interpretation placed upon the seventeenth section of the statute of frauds in *Bailey v. Sweeting*, 9 C. B. (N. S.) 843 (1872), *Wilkinson v. Evans*, L. R. 1 C. P. 407 (1866), and *Buxton v. Rust*, L. R. 7 Ex. 279 (1872), we should conclude that the subsequent writing would be sufficient if it admits the trust, though it disclaims all liability. But if the defendant in a bill in equity to enforce an oral trust in his answer admits the oral trust, still he may set up the statute as a bar to the recovery. *Whiting v. Gould*, 2 Wis. 552, 593 (1853); *Dean v. Dean*, 9 N. J. Eq. 425, 427 (1853); *Tynan v. Warren*, 53 N. J. Eq. 313, 315, 31 Atl. 596 (1895); *Warren v. Tynan*, 54 N. J. Eq. 402, 404, 34 Atl. 1065 (1896). If the defendant admits in his answer the oral trust, but does not set up the statute as a defense, plaintiff will be entitled to have the trust executed. *McLaurie v. Partlow*, 53 Ill. 340, 345 (1870); *Patton v. Chamberlain*, 44 Mich. 5, 5 N. W. 1037 (1880); *Woods v. Dille*, 11 Ohio, 455 (1842); *Whiting v. Gould*, 2 Wis. 552, 593 (1853).

The writing must contain all the terms of the trust. *Smith v. Matthews*, 3 De G., F. & J. 139 (1860).

The terms of the trust need not be contained in one document, but may be gathered from several papers, if connected physically or by reference of one to another, or if on their face referring to the same transaction. *Loring v. Palmer*, 113 U. S. 321, 6 Sup. Ct. 1073, 30 L. Ed. 211 (1886); *McClellan v. McClellan*, 65 Me. 500 (1876).

It is sufficient that the writing be *signed*, unless expressly required to be *subscribed*.

in *Ambrose v. Ambrose* (1 P. Wms. 321) and prevented the custom of London from interposing, and giving to the widow the interest of the trust fund as personal estate.—Chancellor Williamson in *Smith v. Howell*, 3 Stockton (N. J.) 349, 358–359.¹

TIERNEY v. WOOD.

(In Chancery, before the Master of the Rolls, Sir John Romilly, 1854. 19 Beavan, 330.)

In January, 1836, Alexander Wood purchased a house, a close of land and premises, situate at Little Hampton, in Sussex, for the sum of £490. They were conveyed to the plaintiff Tierney in fee, who admitted he held them in trust for Wood.

About the same time, Wood transferred a sum of stock into the plaintiff's name, but by his direction the plaintiff afterwards sold it out, and delivered the proceeds of the sale to Wood.

Soon after the purchase of the house, land, and premises, Wood delivered to the plaintiff a paper writing, signed by him, and dated January, 1837, in these words:

"I hereby desire that, after my death, the stock now in the Bank of England, with the house and land now belonging to me at Little Hampton, shall be held by you, as you at present hold it, for the benefit of my wife, Elizabeth Wood, during her life, and that after her death the same shall continue to be held by you as aforesaid, for the sole benefit of my daughter Mary Wood, in such sort, that it shall be wholly and entirely free from all control of any person with whom she may intermarry. I further desire that, in case my said daughter Mary should leave issue by any marriage which she may contract, the whole of the above property shall pass to such issue, in such manner as she may direct; but that, in case she should die without issue, the whole of the above property shall be equally divided among the lawful issue of my son Alexander Wood, born after 1834, he to have the interest and profits arising from the property during his life. If my son should die without issue, I desire that all the property may be sold, and the money be equally divided among my

¹ If a trustee holding land on an oral trust, though he cannot be forced to execute it, voluntarily executes it, his creditors, at least provided they have obtained no lien thereon, cannot object; that is, the trust, though created orally, is valid, although it cannot be enforced for want of the necessary evidence. *Foote v. Bryant*, 47 N. Y. 544 (1872); *Bork v. Martin*, 132 N. Y. 280, 30 N. E. 584, 28 Am. St. Rep. 570 (1892).

In some jurisdictions a conveyance would be allowed to stand, though made after judgment creditors had obtained a lien upon the land. *Pinney v. Fellows*, 15 Vt. 525 (1843).

There are authorities contra. *Connor v. Follansbee*, 59 N. H. 124 (1879); *Skinner v. James*, 69 Wis. 605, 35 N. W. 37 (1887).

late brother's children now living at Old Craig," &c. "After the death of my wife, I wish my son Alexander to be paid £100. in money, or to be paid £5. a year during his life. If my son Alexander and my daughter Mary have both issue, let the property be equally divided among them; if they have no issue, give £100. to such charity as Mr. Jones' at St. Leonards. Let my son have my books on gardening, my shirts, or any of my clothes that may be of use to him, if he desire to have them.

Alexander Wood.

"January, 1837.

"To the Rev. M. A. Tierney."

Alexander Wood, the elder, died in 1844, intestate, and the plaintiff allowed Mrs. Wood, his widow, to receive the rents of the premises, till her death in June, 1853.

Alexander Wood, the son and heir at law of Alexander Wood the elder, and Mary Wood, the daughter, were living; but the latter has never been married, and questions having arisen as to the rights of the parties interested in the property of Alexander Wood the elder, and as to the effect of the paper writing, the plaintiff instituted the suit to obtain the opinion of the court thereon.

The Master of the Rolls was of opinion that Mary Wood took an estate tail, but reserved his judgment as to the validity of the declaration of trust.

THE MASTER OF THE ROLLS. The question is, whether the document dated in January, 1837, created a good declaration of trust within the seventh section of the Statute of Frauds. That clause is in these words, or to this effect: That after the 24th of June, 1677, all declarations or creations of trusts or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

The first question raised is, whether Alexander Wood is the person who is, by law, enabled to declare the trusts of these lands.

The second question is, whether if he be, this is a declaration of trust, and such a one as can be acted upon.

There is no question but that on the purchase of this property by Alexander Wood, and the conveyance thereof to the Rev. M. A. Tierney, a resulting trust arose in favor of Alexander Wood, which, as it is expressly excepted by the eighth section of the Statute of Frauds, does not require to be evidenced by any writing. In the year 1836, therefore and previous to the signing of this document, the property in question was vested in M. A. Tierney, in fee, in trust for Alexander Wood, in fee simple. Alexander Wood, therefore, was the beneficial owner of this property, and Mr. Tierney had the mere naked legal interest in it. A distinction may be raised between the person who is by law enabled to declare, and the person

who is by law entitled to create the trust. I consider, in the first place, who was by law entitled to create a trust in this property; and, first, I examine what, in such a state of things, would have been the effect of this document, so far as it relates to the stock, which had been transferred into the name of M. A. Tierney, if this had not been sold out afterwards by the direction of Alexander Wood, and the direction to pay the dividends had been complied with by Tierney. The result would have been that the relation of trustee and cestui que trust between Tierney and the person mentioned in the instrument would have been completed, so far as that stock was concerned, and the fact that the document had been a voluntary act on the part of Wood would not have prevented this court from acting upon it. The case of *Ex parte Pye and Dubost* [18 Ves. Jr. 140], and the authorities referred to in *Bridge v. Bridge* [16 Beavan, 315], decided by myself, establish this proposition. Those authorities show that the proper person to create the trust in personal property is the person in whom the beneficial interest of the property is vested; and the trust being created by the beneficial owner, the trustee is bound, and, if disposed to refuse, may be compelled, to obey it.

I am at a loss to find any reason which should cause this document to be effectual as a declaration of trust, so far as the stock is concerned, and not so, so far as the land is concerned. It is obvious that in both cases the person enabled by law to declare the trusts is the same. In the case before me, there can be no doubt that, if Mr. Tierney had, in pursuance of this paper, signed a document to the same effect, stating that he held the property on the trusts therein mentioned, the trusts would, apart from any question on the construction of the document, have been fully and completely declared; and it is also clear, that if the trustee had declared that he held the property on any trusts not recognized or sanctioned by Alexander Wood, the beneficial owner, such declaration of trust would have been insufficient and unavailing, and would have given no interest to the supposed cestui que trust. A declaration of trust in writing by Tierney following that of Wood would therefore have been merely formal, and would have been valid only so far as it followed his instructions, and would have been void to the extent, if any, that it departed from his directions. I think that the fair conclusion to be drawn from these considerations is, that the person to create the trust, and the person who is by law enabled to declare the trust, are one and the same; and that, consequently, the beneficial owner is the person by law enabled to declare the trust.

This is confirmed by the expression in the clause in the statute which relates to "the last will in writing," which can only apply to the beneficial owner. It may also be observed, that if the statute had intended that no trust should be valid, unless evidenced by a writing signed by the trustees, the simple and obvious course would have

been to have so stated it; but the expression used is not "the trustee," but "the person by law enabled to declare the trust." That person is, I think, the beneficial owner; and I am of opinion that, apart from any question of the construction of the document, the fact of its having been signed by Wood, the beneficial owner, transmitted by him to Tierney, the legal owner, and by him acted upon, constitutes it a sufficient declaration of trust within the seventh clause of the statute, so far as that clause requires it to be signed "by the party who is by law enabled to declare such trust."

The next question is, whether the document itself, apart from the signature, is or purports to be a declaration of trust at all. It is contended that, if anything, it is a will imperfectly executed, that it contains no direction as to the present application of the rents, and that the rest of its contents savor of the directions contained in a will rather than of a direction how to apply the rents of the property; for that it is not to take effect till after the death of Alexander Wood, and that it contains directions for sale and the like, inconsistent with the nature and duties of the trust which M. A. Tierney had accepted. There is, undoubtedly, some force in these observations; but, on the whole, I think that this may be treated as a valid declaration of trust. Although it does not declare the whole trust, it declares the trust of a part, and it leaves the resulting trust untouched, except where it expressly interferes therewith. If this document had directed Mr. Tierney to pay the rent to Mr. Wood during his life, and had then proceeded as it does, this objection could not, in my opinion, have been sustained; but this omission is not sufficient to destroy the character of the rest of the interest, which unless where it otherwise disposes of the beneficial interest in the property, leaves it untouched, under the resulting trust vested in Mr. Wood. I am of opinion, therefore, that a good trust was evidenced by this writing within the Statute of Frauds.

The only remaining question is the interest which Mary Wood takes in the land so held in trust for her, and my opinion is that she takes an estate tail.¹

TYNAN v. WARREN and Wife.

(Court of Chancery of New Jersey, 1895. 53 N. J. Eq. 313, 31 Atl. 596.)

GREEN, V. C.² This bill is to establish a trust. * * *

The answer of defendant admits that the property was sold by the sheriff to Tynan and Warren; that each advanced one-half of the

¹ See *Rycroft v. Christy*, 3 Beav. 238 (1840); *Bentley v. Mackay*, 15 Beav. 12 (1851); *Kronheim v. Johnson*, L. R. 7 Ch. Div. 60 (1877).

² Part of the opinion is omitted.

amount paid on the sale; that it was arranged between complainant and defendant that they should procure a loan of \$3,500 from the Paterson Savings Institution on the property to pay the balance of the purchase money and other expenses; that the deed was made out in defendant's name at the suggestion of the complainant, and it was agreed that he, the defendant, "should hold the title to said land in trust for the equal benefit of himself and complainant, subject to the said mortgage of \$3,500 * * * until a purchaser could be found for it."

The defendant thus does not deny the allegation of the bill that the title was put in his name, to be held by him in trust for himself and complainant, but expressly admits that he did agree to take the title to hold the same in trust for the equal benefit of himself and complainant, until a purchaser could be found for it.

This is an express trust. It is not one raised by law from the circumstances of the case, but created, and its terms and conditions fixed, by the express agreement of the parties. * * *

The defendant claims by his answer that the trust is no longer subsisting because the complainant relinquished his interest in the property in consideration of defendant's assumption of certain claims. These allegations of the answer are put in issue by the general replication, and the parties as witnesses tell different stories. It is, however, admitted that the agreement, whatever it was, was a verbal one—could it, if it was even as stated in the answer, have the effect defendant claims for it? It being admitted that the defendant took the title to the whole property on an agreement to hold it for the joint benefit of himself and complainant, he was the legal owner, subject as to an undivided one-half to a trust in favor of the complainant. As to this one-half, there was a legal estate in the defendant and an equitable estate in the complainant. The latter might not be able to enforce it, as has been shown, and this was probably what Mr. Williams meant by saying no papers were necessary. But defendant could not acquire complainant's equitable interest as he claims to have done by his answer through a parol agreement. This would be a transfer of a trust estate, and section 4 of the Statute of Frauds provides that "all grants and assignments of any trust or confidence shall be in writing signed by the party granting or assigning the same, or by his or her last will in writing, or else shall be utterly void and of no effect." This is substantially section 9 of the English Act. Chief Justice Marshall in *Hughes v. Moore*, 7 Cranch, 176, at page 191 [3 L. Ed. 307], says: "The court can perceive no distinction between the sale of land to which a man has only an equitable title, and the sale of land to which he has a legal title; they are equally within the statute." * * *

It is unnecessary, therefore, to ascertain which version of this

parol agreement is correct, as it, whatever it was, was inoperative to transfer complainant's equitable title to defendant.

Decree for complainant.²

SECTION 10.—THE STATUTE OF WILLS.

SCHULTZ'S APPEAL.

(Supreme Court of Pennsylvania, 1876. 80 Pa. 396.)

Appeal from the Orphans' Court of Montgomery County. In the distribution of estate of Frederick Schultz, deceased.

Decedent died September 13, 1872 having made a will dated September 6, 1872, in which he appointed Jonathan Krause executor.

After directing the payment of his debts, etc., the only other provision was: "As touching all the rest, residue and remainder of my estate, real, personal and mixed, I give, devise and bequeath the same unto Reuben Yeakle, now of Cleveland, Ohio, and his heirs and assigns forever."

August 11, 1874, the executor settled an account of his administration showing in his hands a balance of \$10,043.57. Charles T. Miller, Esq., was appointed auditor to distribute the balance. He awarded the fund to Reuben Yeakle. The next of kin filed exceptions to the report. The court overruled the exceptions, confirmed the report and decreed distribution as reported by the auditor.

George Schultz and others, the next of kin of Frederick Schultz, appealed to the Supreme Court.

Mr. Justice SHARSWOOD delivered the opinion of the court, January 31, 1876.

The very able and exhaustive opinions, as well of the auditor as of the learned court below, have relieved us from an examination of the English decisions upon the Mortmain Act of that country. They undoubtedly throw a clear and strong light upon the question presented upon this record. They establish two positions: 1. That if an absolute estate is devised, but upon a secret trust assented to by the devisee, either expressly or impliedly, by knowledge and silence before the death of the testator, a court of equity will fasten a trust

² This case was reversed, 54 N. J. Eq. 402, 34 Atl. 1065, but upon grounds not affecting the foregoing reasoning.

Chattels real are within the statute. *Skett v. Whitmore*, Freem. Ch. 280 (1705).

Chattels personal are not within the statute. The statute deals with lands, tenements, and hereditaments. A trust of a chattel personal can therefore be both created and manifested and proved orally. The authorities to this effect are legion.

on him on the ground of fraud, and consequently the Statute of Mortmain will avoid the devise if the trust is in favor of a charity. But 2. If the devisee have no part in the devise, and no knowledge of it until after the death of the testator, there is no ground upon which equity can fasten such a trust on him, even though, after it comes to his knowledge, he should express an intention of conforming to the wishes of the testator. The latter proposition applies directly to the case now before us. Reuben Yeakle, the legatee named in the will, was not present when the instrument was executed. He had no communication with the testator, directly or indirectly, upon the subject. The testator had long intended to leave his estate for charitable purposes. On his death-bed he sent for a scrivener, and expressed to him his wish to have his property so disposed of after his death. He was informed that if he should die within thirty days, such a disposition would be ineffectual, but that he might make an absolute bequest to some individual, upon the confidence and belief that when he should be informed of his wishes, he would, of his own accord, carry them out. This plan was adopted, and upon the suggestion of one of the bystanders, Reuben Yeakle, the bishop of the church to which the decedent belonged, was chosen by him. It is clear, not only from the evidence, but from the verdict of the jury in the issue of *devisavit vel non*, that no undue influence was exercised to procure the will. It was the testator's own free and voluntary act, and he was told "that he could dispose of his property to a particular person unconditionally, and if that man would do it, then he could put it to those places where he wanted it; but that would be entirely at his option; he could do it or not." Reuben Yeakle was not informed of the will until some time after the death of the testator. When informed of it he declared his intention to appropriate the money as the testator wished it to be. He said, when examined as a witness before the auditor: "I have not seen the will, but if it gives me the absolute right to the property without condition, I should consider that I had the legal right to do with the property as I pleased. I draw a distinction in this between the legal and moral right."

We are unshackled by authority upon this question. The English precedents upon the construction of their Statute of Mortmain are not binding upon this court and with us the question is an entirely new one. By the eleventh section of the Act of Assembly of April 26, 1855 (P. L. 332), it is provided, "that no estate, real or personal, shall hereafter be bequeathed, devised or conveyed to any body politic, or to any person, in trust for religious or charitable uses except the same be done by deed or will, attested by two credible and at the same time disinterested witnesses, at least one calendar month before the death of the testator or alienor, and all dispositions of property contrary hereto shall be void, and go to the residuary legatee or devisee next of kin or heirs according to law."

It seems very clear that the bequest in the will of Frederick Schultz to Reuben Yeakle is not within the words of the statute. There is nothing in the circumstances to fasten a trust upon him. The statute out of the way, the charities intended to be benefited would have had no claim, legal or equitable, to enforce payment by him to them. He would, in the eye of the law, be guilty of no fraud, legal or equitable, either against them or the testator, if he should, even at this day, change his intention and apply the money to some other use. Being the absolute owner, under the will, the declaration of his intention, would not be binding upon him. It is not, therefore, in the words of the statute, a bequest "to a body politic or to any person in trust for religious or charitable uses." Had Reuben Yeakle been present when the will was executed, or the objects of the bequest been communicated to him before the testator's death, and he had held his peace, there would have been some ground for fastening a trust upon him *ex maleficio*, as in *Hoge v. Hoge*, 1 Watts, 163, 26 Am. Dec. 52. But nothing of that kind can be pretended here.

It has been contended, however very strenuously, that as Edward Schultz proposed Reuben Yeakle to the testator as the man, the acceptance of Reuben Yeakle of the bequest recognized Edward Schultz as his attorney, and ratified whatever he had said and done. They urge the maxim, *omnis rati habitio retrotrahitur et mandato æquiparatur*. It is a very ingenious contention, but unfortunately for the appellants, there is nothing in the evidence upon which it can be built. Edward Schultz did not undertake for Reuben Yeakle; he gave the testator no assurance that he would accept and carry out his intentions when made known to him. He says: "I proposed Reuben Yeakle, so far as I remember, for the man. Frederick then agreed to Reuben Yeakle. Reuben Yeakle was considered to be an honest man, and it was for this reason he was taken, and because he was acquainted with these societies mentioned." "As far as I can recollect, I said, that through Yeakle his desire could be carried out in the distribution of his property." "The object was to carry out the wish of Frederick in that way. There was a chance to carry it out in that way if the legatee was willing, and Reuben Yeakle was selected because it was thought he would agree to it." There is nothing in all this which indicates any promise or assurance by Edward Schultz to the testator that Reuben Yeakle would accept the bequest in trust for the charities. There was the mere expression of an opinion, concurred in by the testator, that when the legatee came to understand the object and purpose of the bequest to him, as an honest man he would carry out the intention of the testator.

It is urged, however, that the whole plan is nothing but a contrivance to evade the statute. No doubt such was the intention of the testator. It is said that it is a fraud upon the law, and that the bequest ought therefore to be declared void. But that overlooks the fact that the absolute property in the subject of this bequest has vested

in the legatee, and that he is entirely innocent of any complicity in the fraud of the testator. If the statute is practically repealed by this construction it is evident that it must be for the Legislature to devise and apply a remedy, not the judiciary, whose province is not *jus dare* but *jus dicere*. Decree affirmed.

SECTION 11.—REVOCABILITY OF TRUSTS.

BILL v. CURETON.

(In Chancery, before the Master of the Rolls, Sir C. C. Pepys, 1835. 2 Mylne & Keen, 503.)

THE MASTER OF THE ROLLS.¹ The bill in this case is filed by the party who made a voluntary settlement of stock in 1827, the trusts of which I shall presently state, * * * and the object of the bill is, to obtain the trust fund from the trustee, or, in other words, to destroy the voluntary settlement. By the settlement of 1827, the stock was transferred to trustees, and the trusts of it were declared to be for the settlor till she should marry; and upon her marriage, for her separate use for life; and after her death, for her children, to be equally divided among them; and in default of children, for her next of kin. * * *

That a voluntary settlement, where the trust is actually created, is binding upon the settlor, has been so long, and is so fully established, that no attempt to raise the question would probably have been now made, were it not that the modern cases of *Wallwyn v. Coutts* [3 Mer. 707] and *Garrard v. Lauderdale* [3 Sim. 1] have been supposed to be inconsistent with that doctrine. * * *

The grounds, upon which the Judges who decided those cases professed to proceed, are sufficient to prevent their decisions from being considered as authorities against the well established doctrine. * * *

The result is, that the author of this settlement is bound by it, and is not entitled to the assistance of this court to relieve herself from it.²

¹ Part of the opinion is omitted.

² The creator of a trust created after the analogy of a feoffment to uses may retain the power to revoke the trust. *Stone v. Hackett*, 12 Gray (Mass.) 227, 232 (1858); *Van Cott v. Prentice*, 104 N. Y. 45, 10 N. E. 257 (1887).

CHAPTER II.

THE NATURE OF THE CESTUI QUE TRUST'S INTEREST.

SECTION 1.—HIS CLAIM IS PURELY EQUITABLE, SO LONG AS THE RELATION OF TRUSTEE AND CESTUI QUE TRUST EXISTS.

MEGOD'S CASE.

(Court of Queen's Bench, 1585. 4 Leonard, 225.)

A enfeoffed B to the intent that B should convey the land to such person as A should sell it. A sold it to C, to whom B refused to convey the land; and thereupon he brought an action upon the case against B. And by WRAY, Chief Justice, and GAWDY, Justice, here is a good consideration, for here is a trust, and that which is a good consideration in the chancery is in this case sufficient. SHUTE, Justice, was of a contrary opinion. And afterwards judgment was given for the plaintiff.¹

MILLER v. LERCH.

(Circuit Court of United States, Eastern District of Pennsylvania, 1848. 1 Wall. Jr. 210, Fed. Cas. No. 9,579.)

Peter Miller of Easton, devised an estate of about \$300,000 to two church corporations of that town, upon certain trusts which his heir at law, the present plaintiff, contended were void, but which the corporations asserted were charitable uses, and as such entitled to the protection given to that class of gifts. A large part of the devise was real estate, which the present action—one of ejectment—was brought to recover. The question was, whether admitting the trust to be void, the plaintiff had such a legal title as would enable him to recover

¹ Dicta to the same effect are found. *Butler v. Butler*, 2 Sid. 21 (1657); *Jevon v. Bush*, 1 Vern. 342 (1685); *Smith v. Jameson*, 5 T. R. 601, 603 (1794).

The doctrine of the principal case and these dicta was long since exploded. *Forde v. Hoskins*, 1 Rolle, 125 (1615); *Turner v. Sterling*, Freeman, 15 (1671); *Barnadiston v. Soame*, 6 How. St. Trials, 1063, 1098, 1107, 1108 (1697); *Sturt v. Mellish*, 2 Atk. 610, 612 (1743); *Holland v. Holland*, 4 Ch. App. Cas. 449, 451 (1869).

here in ejectment. In other words, whether the legal title was not in the corporations, and whether the remedy of the heir was not by bill in equity on the other side of this court. Both corporations were created under an act of Legislature, which, with a supplement, empowered them to "take, receive and hold all and all manner of land, etc. to be employed and disposed of according to the objects, articles, and conditions" of their charters, "provided that the clear yearly value or income of the messuages, etc." did not exceed \$2,000.

The charters gave no express power to hold lands in trust for purposes not within the scope of their objects.

Mr. J. M. Porter and Mr. M. H. Jones in support of the action. The statutes of Mortmain apply to Pennsylvania corporations, whatever counsel may have said *arguendo*.

GRIER, J.¹ In England, under the statute of 9 Geo. II, c. 36, when lands are devised to a charity, the trust not only is itself void, but it vitiates the devise of the legal estate on which it was engrafted. And, therefore, in such cases the heir may recover at law, except where there are other trusts not charitable, which, of course, would entitle the trustees to retain the estate, and oblige the heir to prosecute his claim in equity. But this statute, which is usually, though rather inaccurately, called "The statute of Mortmain" was never adopted in Pennsylvania, nor is there to be found any similar provision in our own legislation. It is, however, by virtue of this statute alone, and not by any principle of the common law or provision of earlier statutes, that courts of law in England treat the devise or gift as void, and permit the heir to recover in them. * * *

I fully concur with those who refuse to admit that any of the English statutes of mortmain have, or ever had, any operation in Pennsylvania. * * *

It is enough for the purposes of the present case that these statutes would not make void a conveyance in mortmain, but only expose the land to forfeiture by the entry of the Commonwealth. It is therefore a doctrine well settled in Pennsylvania, that a corporation has a right to purchase, hold and convey lands in this state without a license, until some act is done by the government, according to its own laws, to vest the estate in itself. The fact, therefore, that the license contained in the acts of incorporation limits the income of these corporations to \$2,000, cannot affect the present question, and it does not avoid the devise in consequence of its being beyond the limits of the license. The legal estate passes by the gift or devise to the corporation, and is defeasible by the commonwealth alone.

The remedy therefore of the plaintiff should be by bill in equity, and not by ejectment. If, on the hearing of the case in equity, the court should be of opinion that the trusts limited on this devise are

¹ Part of the opinion is omitted.

such as a chancellor would not execute, it will treat the devisees as trustees for the heirs at law or next of kin, and decree a conveyance of the legal estate to them. Judgment accordingly.²

CEARNES v. IRVING and STRATHERS.

(Supreme Court of Vermont, 1859. 31 Vt. 604.)

Account. The declaration set forth that the plaintiff and the defendants were jointly interested in certain lands to the amount of twenty thousand acres lying in McKean county, Pennsylvania, the legal title to which was in the defendant Irving, but who held it in trust for the joint benefit of the plaintiff and the defendants, and that the plaintiff and the defendants were jointly interested in the profits arising from the sale of such lands; that on or about the 1st day of February, 1855, the defendants sold said land for the joint profit and benefit of the plaintiff and defendants, for \$25,000 in money and \$50,000 in the capital stock of the Rutland and Washington Railroad Company; and that the defendants thereby received from the profits of said sale \$10,000 in money and \$20,000 worth of said stock above their just share thereof, etc. etc., setting forth their refusal to account therefor to the plaintiff. To this declaration the defendants demurred generally. The demurrer was sustained and judgment rendered for the defendants to which the plaintiff excepted.

REDFIELD, Ch. J. The difficulty is that the plaintiff shows no legal title to the property out of which the account arises. The very declaration shows that his only claim of title is an equitable one. And in such cases we regard it as perfectly well settled that the only proper remedy is in a court of equity, where all mere trusts are of right cognizable. 1 Story's Eq. Jur. §§ 453, 454.

It is perfectly well settled that at law the plaintiff could not have recovered his proportion of the land. And if he had been in possession, the defendant Irving might have recovered the whole land against the plaintiff. *Beach v. Beach*, 14 Vt. 28, 39 Am. Dec. 204. And we are unable to perceive any better reason why the plaintiff should maintain an action of account for the avails of the sale of the land, than for his maintaining ejectment for the land.

Judgment affirmed.³

² A cestui cannot maintain detinue against his trustee for the trust res. *Redwood v. Riddick*, 4 Munf. (Va.) 222 (1814).

³ A cestui cannot maintain trover against his trustee for a conversion of the trust res. *Jasper v. Hazen*, 1 N. D. 75, 44 N. W. 1018 (1890); *Howard v. Menifee*, 5 Ark. 668 (1843); *Louisville Trust Co. v. Stockton*, 75 F. R. 62 (1896).

The trustee can maintain an action of trover against his cestui for the conversion of the trust res. *Guphill v. Isbell*, 8 Rich. Law (S. C.) 463 (1832). This, of course, only in jurisdictions not allowing equitable pleas.

BEACH v. BEACH.

(Supreme Court of Vermont, 1842. 14 Vt. 28, 39 Am. Dec. 204.)

Ejectment by trustee against cestui que trust. Plaintiff proved legal title in himself. The court excluded evidence offered to show plaintiff held the legal title in trust for defendant.

WILLIAMS, Ch. J. This is an action of ejectment in which the title is to be decided, the judgment in which is conclusive against both the plaintiff and defendant and their heirs. The question presented is, whether, at law, the title of the cestui que trust shall prevail against that of the trustee.

In the action of ejectment, in England, when the right of possession, only, is determined, the plaintiff must be vested with the legal title in order to maintain it, and no equitable title will answer. The trustee may maintain this action against his cestui que trust. *Read v. Read*, 8 Term, 118. In some of the states, where they have no court of chancery, a cestui que trust has been permitted to recover when chancery would direct a conveyance. But if it were so in this state, it would not help the defendant. There is nothing in the facts offered to be proved, which warrants the inference that a court of chancery would direct a conveyance, though they might prevent the plaintiff from disturbing the defendant's possession, unless it was to accomplish the purposes of the trust. There are no dicta in the decisions of any of the states, that the cestui que trust can, as against his trustee, either maintain or defend an action of ejectment.

The evidence offered did not present a case where the jury would have been directed to presume a conveyance. The plaintiff was under no obligation to convey to the defendant; but, on the contrary, the grantor did not intend that the legal estate should vest in him, and the plaintiff would have violated the trust had he made such a conveyance.

The principle is not different, if this was a resulting trust, except that such trust might be proved by parol. If a trust resulted from the fact that the purchase money was paid, six-sevenths by the father, and one-seventh by the defendant, the very object of a suit might have been to secure the portion due to the father. The trust, if any existed in this case, could only be enforced in chancery. The judgment of the County court is affirmed.¹

"But it is further objected that, if Brown is the trustee, the action of ejectment will not lie, because a cestui que trust cannot compel an execution of the trust in a court of law.

¹ A trustee can maintain *detinue* against his cestui for the trust res, *Gunn, Trustee v. Barrow*, 17 Ala. 743 (1850); *Newman v. Montgomery*, 6 Miss. 742 (1841); except, of course, in jurisdictions allowing equitable pleas.

"That such is the general rule at this day cannot be denied, notwithstanding what was ruled in *Lade v. Halford*, B. N. P. 110, and in *Armstrong v. Pierce*, 3 Burr. 1901, and a few other early cases, to the effect that a cestui que trust, in ejectment, could not be non-suited by a term outstanding in his trustee, and that a trustee, a plaintiff in ejectment, could not recover against his own cestui que trust.

"The rule before those decisions was, and since then has been fully re-established, that a cestui que trust cannot recover in ejectment against his trustee, unless a surrender to him of the legal estate can be reasonably presumed. *Doe v. Staple*, 2 Term R. 684; *Doe v. Sybourn*, 7 Term R. 2; *Goodtitle v. Jones*, 7 Term R. 45.

"The cestui que trust has no alternative but to bring his action (against a stranger) in the name of his trustee. And the trustee, as tenant of the legal estate, may recover in ejectment from his own cestui que trust, who has no defense at law, but is only entitled to sue out an injunction in equity. *Annesly v. Simeon*, 4 Madd. 390; *Roe v. Read*, 8 Term R. 122, 123; *Shine and Gough*, 1 Ball & Beat. 445.

"Yet the surrender of a trust or the conveyance of the legal estate may be presumed from circumstances, and that seems to have been the ground of the opinions in *Lade v. Halford* and *Armstrong v. Pierce* and the concurring authorities."—Per Haines, J., *Brown v. Combs*; 29 N. J. Law, 36, 39, 40 (1860).²

JACKSON v. STEVENS.

(Supreme Judicial Court of Massachusetts, 1871. 108 Mass. 94.)

Contract for money had and received.

Plaintiff borrowed \$1,500 of defendant and with it paid for a wood-lot, the legal title to which he caused to be conveyed to the defendant as security for the loan until the same should be repaid, the plaintiff agreeing to pay defendant on the loan the same rate of interest the defendant was then receiving on his money which was invested in government bonds and also to pay the defendant for his time, trouble and risk.

Five or six months later the plaintiff found a purchaser for \$2500. The defendant conveyed title to the land to the purchaser, who paid the plaintiff \$500 and the defendant \$2,000. Several days later the plaintiff claimed of the defendant the balance of the \$2,000 after deducting the \$1,500 and interest, etc. and the defendant refused to pay the balance or any part of it. The plaintiff then began this action. Verdict for the plaintiff and defendant alleged exceptions.

WELLS, J. Under the instructions given to the jury, their verdict

² To-day in most jurisdictions the cestui que trust is not required to resort to equity to enjoin the action brought against him by his trustee, but may set up an equitable plea in the law action itself.

must be taken to have established three facts: 1. That the land was purchased by or for the plaintiff. 2. That the purchase money paid for it was the money of the plaintiff; having been borrowed by him for that purpose from the defendant. 3. That the deed was taken to the defendant as security for that loan. These facts constitute a resulting trust.

So long as the trust remained unexecuted, it could be enforced only in equity. But it has been executed by a sale and conveyance of the land. The debt to the defendant and his expenses having been satisfied from the proceeds, there remains a balance of money in his hands which in equity and good conscience belongs to the plaintiff. This he may recover in an action at law as for money had and received.

SECTION 2.—CESTUI QUE TRUST IS A CLAIMANT
AGAINST THE TRUSTEE PERSONALLY,
NOT AGAINST THE TRUST RES.

1. HIS CLAIM IS ENFORCEABLE WHEREVER THE TRUSTEE MAY BE,
WITHOUT RESPECT TO THE SITUS OF THE TRUST RES.
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MASSIE v. WATTS.

(Supreme Court of the United States, 1810. 6 Cranch, 148, 3 L. Ed. 181.)

This was an appeal from the decree of the Circuit Court of the United States, for the District of Kentucky, in a suit in equity brought by Watts, a citizen of Virginia, against Massie, a citizen of Kentucky, to compel the latter to convey to the former 1000 acres of land in the state of Ohio, the defendant having obtained the legal title with notice of the plaintiff's equitable title. Plaintiff claimed as assignee of one Oneal.

MARSHALL, Ch. J., delivered the opinion of the court, as follows:¹

This suit having been originally instituted, in the Court of Kentucky, for the purpose of obtaining a conveyance for lands lying in the state of Ohio, an objection was made by the plaintiff in error, who was the defendant below, to the jurisdiction of the court by which the decree was rendered. * * *

Was this cause to be considered as involving a naked question of title; was it, for example, a contest between Watts and Powell, the jurisdiction of the Circuit Court of Kentucky would not be sustained. But where the question changes its character, where the defendant in the original action is liable to the plaintiff, either in con-

¹ Part of the opinion is omitted.

sequence of contract, or as trustee, or as the holder of a legal title acquired by any species of mala fides practiced on the plaintiff, the principles of equity give a court jurisdiction wherever the person may be found, and the circumstance, that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction.

In the celebrated case of *Penn v. Lord Baltimore* [1 Ves. 444], the Chancellor of England decreed a specific performance of a contract respecting lands lying in North America. The objection to the jurisdiction of the court, in that case, as reported by Vesey, was not that the lands lay without the jurisdiction of the court, but that, in cases relating to boundaries between provinces, the jurisdiction was exclusively in the king and council. It is in reference to this objection, not to an objection that the lands were without his jurisdiction, that the Chancellor says, "This court, therefore, has no original jurisdiction on the direct question of the original right of boundaries." The reason why it had no original jurisdiction on this direct question was, that the decision on the extent of those grants, including dominion and political power, as well as property, was exclusively reserved to the king and council.

In a subsequent part of the opinion, where he treats of the objection to the jurisdiction of the court, arising from its inability to enforce its decree in rem, he allows no weight to that argument. The strict primary decree of a court of equity is, he says, in personam, and may be enforced in all cases where the person is within its jurisdiction. In confirmation of this position he cites the practice of the courts to decree respecting lands lying in Ireland and in the colonies, if the person, against whom the decree was prayed, be found in England.

In the case of *Arglasse v. Muschamp*, 1 Vernon, 75, the defendant, residing in England, having fraudulently obtained a rent charge on lands lying in Ireland, a bill was brought in England to set it aside. To an objection made to the jurisdiction of the court the Chancellor replied, "This is surely only a jest put upon the jurisdiction of this court by the common lawyers; for when you go about to bind the land and grant a sequestration to execute a decree, then they readily tell you that the authority of this court is only to regulate a man's conscience, and ought not to affect the estate, but that this court must agere in personam only; and when, as in this case, you prosecute the person for a fraud, they tell you that you must not intermeddle here, because the fraud, though committed here, concerned lands that lie in Ireland, which makes the jurisdiction local, and so wholly elude the jurisdiction of this court." The Chancellor, in that case, sustained his jurisdiction on principle, and on the authority of *Archer and Preston*, in which case a contract made respecting lands in Ireland, the title to which depended on the act of settlement, was

enforced in England, although the defendant was a resident of Ireland, and had only made a casual visit to England. On a rehearing before Lord Keeper North this decree was affirmed.

In the case of *The Earl of Kildare v. Sir Morrice Eustace and Fitzgerald*, 1 Vern. 419, it was determined that if the trustee live in England, the Chancellor may enforce the trust, although the lands lie in Ireland.

In the case of *Toller v. Carteret*, 2 Vern. 494, a bill was sustained for the foreclosure of a mortgage of lands lying out of the jurisdiction of the court, the person of the mortgagor being within it.

Subsequent to these decisions was the case of *Penn against Lord Baltimore*, 1 Ves. 444, in which the specific performance of a contract for lands lying in North America was decreed in England.

Upon the authority of these cases, and of others which are to be found in the books, as well as upon general principles, this court is of opinion that, in a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree.

The inquiry, therefore, will be, whether this be an unmixed question of title, or a case of fraud, trust or contract.²

² The court held (6 Cranch, 170, 3 L. Ed. 189) that Massie was a trustee for plaintiff as assignee of Oneal and affirmed the decree of the Circuit Court.

See *Arglasse v. Muschamp*, 1 Vern. 75 (1682); *The Earl of Kildare v. Sir Morrice Eustace*, 1 Vern. 405, 419 (1686).

In some jurisdictions, where a trustee refuses or neglects to transfer to the cestui que trust pursuant to the decree of the court land held in trust, the court is by statute empowered to appoint some officer to make the transfer in place of the trustee. If the land is out of the jurisdiction of the court, a conveyance by such an officer is ineffectual to pass the title. *Burnley v. Stevenson*, 24 Ohio St. 474, 15 Am. Rep. 621 (1873); *Watkins v. Holman*, 16 Pet. 25, 10 L. Ed. 873 (1842).

"A court of chancery, acting in personam, may well decree the conveyance of land in any other state, and may enforce their decree by process against the defendant. But neither the decree itself, nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court."—Per Justice McLean, *Watkins v. Holman*, 16 Pet. 25, 57, 10 L. Ed. 873.

If the trust res is within the jurisdiction of the court, a transfer by such an officer pursuant to decree of the court is valid and operative. *Felch v. Hooper*, 119 Mass. 52 (1875).

Irrespective of statute, a court of equity cannot divest a person of title to property and vest it in some one else. So if a court of equity removes a trustee and appoints a successor the only way by which the new trustee can acquire title to the property held in trust is by a conveyance to him by the old trustee.

Speaking of the jurisdiction of the Chancellor, Dean Langdell in his *Equity Pleading* (2d Ed. § 43) says: "Indeed, as a rule, the Chancellor, like the ecclesiastical courts, had no jurisdiction in rem, and hence could only enforce his orders or decrees by process in personam."

In note 4 to the same section he adds: "This power of creating and extinguishing titles the Chancellor never had, nor claimed to have, except when it was given by statute. It is true that he frequently directed the sale of property, but it was by his control over the person of the owner, that he made the sale effective—i. e., when the sale had been made he compelled the

II. CESTUI QUE TRUST HAS NO REMEDIES, LEGAL OR EQUITABLE, DIRECTLY AGAINST A STRANGER.

YEAR BOOK 15 HEN. VII, fol. 12, pl. 23.

(In the Common Pleas, 1479.)

Note by the whole court. The feoffor upon confidence cannot justify in his own name the taking of beasts damage feasant in lands which his feoffees have to his use, nor make avowry for damage feasant in his own name, but in the name of his feoffees; otherwise the trespasser would be twice punished. For by the common law the feoffees upon confidence have an action against the feoffor as against other strangers, if he enters upon the land without being enfeoffed thereof. For by the common law the feoffor is but a trespasser¹ upon the feoffee by his occupancy. And consequently the feoffor who is but a trespasser cannot justify the taking of the beast of a stranger damage feasant upon the land, as he cannot have the damages for the trespass, but the feoffee. And the statute of R. III was not made for advantage of the feoffors, but for the profit of others who purchase from them. And so the power of the feoffor is not enlarged by that statute except to enter and forthwith make feoffment. But the judges agreed that a commoner can justify the taking of the beasts of a stranger damage feasant upon the land by reason of the legal interest he has. The feoffor cannot have an action against a stranger for his trespass done upon the land because he is but a trespasser and is not like a disseizor for the feoffor shall not be called a disseizor, unless he occupy against the will of the feoffee.²

owner to execute a deed pursuant to the sale; and hence, when the owner was out of the jurisdiction, or labored under any incapacity, e. g., that of infancy, the chancellor was powerless. He could not even make the appointment of a new trustee effective, except by compelling the old trustee or his heir, or whoever held the legal title, to convey to the new trustee. * * * Indeed, it may be stated broadly that a decree in chancery has not in itself (i. e., independently of what may be done under it) any legal operation whatever."

See *Davant, Trustee v. Guerard*, 1 Spears (S. C.) 242 (1843); also language of Field, J., in *McCann v. Randall*, 147 Mass. 81, 98, 99, 17 N. E. 75, 9 Am. St. Rep. 666 (1888).

Of course to-day in many jurisdictions the appointment of a new trustee by a court having jurisdiction vests the title to the trust property in the new trustee without further action. Yet the operation of the court's decree is limited to the trust property within the jurisdiction of the court. *Contee v. Lyons*, 19 D. C. 207 (1890).

¹ Y. B. 4 Edw. IV, fol. 7, pl. 9, acc.

² At the present day, however, any person in possession, and therefore a cestui que trust, may maintain trespass quare clausum fregit for a wrongful entry. *Cox v. Walker*, 26 Me. 504 (1847); *Stearns v. Palmer*, 10 Metc. (Mass.) 32 (1845).

DOE, on the Demise of BRISTOW, v. PEGGE.

(King's Bench, 1787. 1 Term Rep. 758, note "a.")

Ejectment was brought for a moiety of the manor of Winkburne, &c., under the will of D. Burnell, as one of his co-heirs. By the testator's marriage settlement in 1748 two terms in trust were created: one for ninety-nine years, to secure an annuity of £200. to his mother; the other for one thousand years, for raising £3,000. for his wife, in case she should have no issue; the money to be raised out of the rents and profits, or by sale or mortgage. The testator died in 1774, having no issue, and devised all his estates to trustees and their heirs, to the use of them and their heirs in trust, after the death of his widow, who was entitled to a life-estate under the marriage settlement, for such person or persons as according to the laws of descent should be his heirs-at-law, and the heirs of their bodies, to take as tenants in common, &c., if more than one. The defendant filed a bill in chancery in 1776 against all persons who were supposed to have any claim as heirs-at-law, and against the trustees, and an issue was directed under which he was found heir-at-law by descent from a daughter of a common ancestor. The lessor of the plaintiff also had filed a bill in 1783, his claim having never been known before; but upon the death of the widow he brought this ejectment, and proved his pedigree from another daughter of the same common ancestor. At the trial the defendant set up these terms; the testator's mother being still living, and her annuity regularly paid by the receiver appointed by the Court of Chancery; the £3,000. having likewise been raised for his widow, and the term assigned in mortgage.

Mr. Justice Heath, who tried the cause at the last assizes at Nottingham, nonsuited the plaintiff, with leave to move to set aside the nonsuit, and enter a verdict for the plaintiff, if the court should be of opinion that he was entitled to recover.

Upon the motion, it was stated that the receiver had been appointed by the Court of Chancery during the life of the widow, and for such premises only as her life-estate did not extend to; and that the lessor of the plaintiff did not desire to disturb the terms, but was ready to partake of the charge.

LORD MANSFIELD, C. J. An ejectment is a fictitious remedy to try the title to the possession of lands; it is of infinite consequence that it should be adapted to attain the ends of justice, and not entangled in the nets of form. Great difficulties have arisen as to the legal form of passing land, from the modes of conveyancing in England since the Statute of Uses. Trusts are a mode of conveyance peculiar to this country. In all other countries, the person entitled has the

right and possession in himself. But in England estates are vested in trustees, on whose death it becomes difficult to find out their representatives; and the owner cannot get a complete title. If it were necessary to take assignments of satisfied terms, terrible inconveniences would ensue from the representatives of the trustees not being to be found. Sir E. Northey's clerk was trustee of near half of the great estates in the kingdom; on his death it was not known who was his heir or representative. So that where a trust term is a mere matter of form, and the deeds were muniments of another's estate, it shall not be set up against the real owner. It is therefore settled that a satisfied trust shall be taken to be a trust for the benefit of the heir-at-law. A trust shall never be set up against him for whom the trust was intended. It is a mere form of conveyance. And it is admitted that, where the term is in trust for the benefit of the lessor of the plaintiff, the defendant shall not set it up in ejectment as a bar to his recovery.

To go a step further: third persons may have titles, and therefore the court say, that where there is a tenant in possession under a lease, which is a bar to the recovery of the lessor, he being to recover by the strength of his own title, yet to prevent this from being turned improperly against the person entitled to the inheritance, whose right is not disputed by the tenant, if the lessor dispute the property only against another, and give notice to the tenant that he does not mean to disturb his tenancy, the court will never suffer the tenant to set up the lease as a bar to the recovery.

There is another distinction to be taken, whether, supposing a title superior to that of the lessor of the plaintiff exists in a third person, who might recover the possession against him, it lies in the mouth of a defendant to say so in answer to an ejectment brought against himself by a party having a better title than his own. I found this point settled before I came into this court, that the court never suffers a mortgagor to set up the title of a third person against his mortgagee. For he made the mortgage, and it does not lie in his mouth to say so, though such third person might have a right to recover possession. Nor shall a tenant who has paid rent, and acted as such, ever set up a superior title of a third person against his lessor, in bar of an ejectment brought by him; for the tenant derives his title from him. Laying down these principles, let us now see the application of them to this case. There are disputes between the plaintiff and the defendant, who are co-heirs; as such, the plaintiff claims half of the property, and wishes to be admitted into possession of the premises with the defendant. He proves his descent. Then what is the defence set up? A trust for a third person, an annuity, is set up. The plaintiff admits the charge, and says that he only claims subject to the incumbrances. The trustees do not assert their title. Then shall others be admitted to set it up? It is

clear that the other co-heirs shall not be permitted to dispute the title with him. He and the defendant have an equitable title as tenants in common, and the plaintiff must recover a moiety.¹

DAVIS and Others v. CHARLES RIVER BRANCH RAILROAD COMPANY.

(Supreme Judicial Court of Massachusetts, 1853. 11 Cush. 506.)

Hearing before a sheriff's jury empanelled to assess damages to the petitioners by the location of the respondent railroad. The evidence showed that the legal title to the land taken by the respondent for its road was in one John Robinson as trustee for petitioners and not in the petitioners. The respondent objected that it did not appear that the title to the premises was in the petitioners and requested the sheriff so to instruct the jury, but he instructed them that they were to render their verdict for the damages to the whole land, irrespective of title; that nothing was settled in this hearing as to the title. The respondent excepted to this ruling and in the court of common pleas, where the verdict for the petitioners was returned, moved to set it aside for alleged errors of the sheriff in point of law. This motion was granted and petitioners appealed.

THOMAS, J.² * * * 3. The legal title to the estate was in John Robinson, the trustee. He should have been the petitioner, and would have recovered the damages, to be disposed of under his trust. The petitioners have not a title upon which the verdict can rest.³

¹ The other justices, Willes, Ashurst, and Buller, concurred. The concurring opinions of the last two are omitted.

Lord Mansfield was a distinguished equity lawyer before he became Chief Justice of the King's Bench. His predilections for equity were such as readily to lead him to confuse the boundaries of law and equity. It remained for his successor, Lord Chief Justice Kenyon, to set the court right and once more clearly to mark the boundary between the two. *Hodsen v. Staple*, 2 T. R. 684 (1788); *Goodtitle v. Jones*, 7 T. R. 43 (1796); *Roe v. Reade*, 8 T. R. 118 (1799). The views of Lord Kenyon have generally prevailed.

Speaking of Lord Mansfield's view, Mr. Lewin quotes the language used by Lord Redesdale in *Shannon v. Bradstreet*, 1 Sch. & Lef. 66: "Lord Mansfield had on his mind prejudices derived from his familiarity with the Scotch law, where law and equity are administered in the same court." Lewin, *Trusts* (8th Ed.) 677.

In Pennsylvania a cestui que trust may maintain an action of ejectment against a person other than his trustee. *Kennedy v. Fury*, 1 Dall. (Pa.) 72, 1 L. Ed. 42 (1783). This decision, made at a time when the courts of Pennsylvania had no equity jurisdiction, has continued the law of that state ever since. The trustee, however, may also maintain an ejectment against any one but his cestui que trust or one claiming under the cestui que trust. *Brolaskey v. McClain*, 61 Pa. 146, 164, 165 (1869).

² Part of the opinion is omitted.

³ *Packard v. Old Colony Railroad Co.*, 168 Mass. 92, 46 N. E. 433 (1897) acc.

In re URUGUAY CENTRAL AND HYGUERITAS RAILWAY
COMPANY OF MONTE VIDEO.

(High Court of Justice, Chancery Division, 1879. L. R. 11 Ch. Div. 372.)

Petition.

The Uruguay Central and Hygueritas Railway Company of Monte Video, Limited was incorporated in 1873. One of its objects was to enter into and carry into effect a certain trust deed. £100. bonds to the aggregate amount of £143,000. were issued by it and the petitioner held six of them. Each bond contained this provision: "The Uruguay Central and Hygueritas Railway Company of Monte Video, Limited, in consideration of the sum of £100. owing by them on the security of this bond, hereby covenant with the said George Wilken-son Drabble, Lord Henry Gordon Lennox, and Loftus Fitzwygram, their executors and administrators, that the company will, by the operation of such cumulative sinking fund as mentioned below, pay to the bearer hereof the sum of £100. on the 31st day of December, 1915, * * * and interest on the said sum of £100., so owing as aforesaid, at the rate of £7. per cent. per annum from the 30th of June, 1874, until payment of the said principal sum."

The company made default in payment of the interest on their bond debt; and a sum of £93. being due to the petitioner for arrears of interest on his six bonds, he, after having served the usual statutory demand, presented this petition to wind up the company, alleging that it was insolvent.

JESSEL, M. R.¹ I am not satisfied that the plaintiff is a creditor. * * * In the absence of any authority I am not prepared to hold that this form of document, this bond, makes the person who holds the bond, or who holds the coupon, a creditor either at law or in equity. * * *

It is a very peculiar document indeed, but that it was not intended to make the company liable to be sued, I think is very plain. * * *

I cannot imagine that this document can give either the bearer of the coupons as regards interest, or the bearer of the bond as regards principal, an immediate right of action for money lent or money due. It is not the meaning of the transaction. The whole transaction means this, that both the share and the bond are issued as a mode of securing to the person advancing the money for making the line certain benefits and he takes the benefits as they are given to him. That does not appear to me, as I said before, to create any direct debt from the company. In fact it is hardly possible it can be so, because the company is liable to pay the trustees under the deed, and they cannot be sued twice over. Are they to have two actions brought, one by the trustees, and the other by the holder of the coupon; and

¹ Part of the statement of the case, as also of the opinion, is omitted.

are they to be liable to every person who cuts a coupon off a bond to an action, simply because he is the holder of a coupon? It does not appear to me that it was the intention of the parties, which, after all, is the governing rule in deciding questions of equitable debt, to create a debt for which the holder of the coupon could sue directly. I think, therefore, that the holder of the coupon, who claims now for interest unpaid is not a creditor either at law or in equity within the meaning of the Companies' Acts. Petition dismissed with costs.²

KING & CO. v. HILL.

(Supreme Court of Alabama, 1852. 20 Ala. 133.)

Error to the Circuit Court of Madison.

An execution in favor of the plaintiffs in error was levied on certain slaves as the property of James W. Hill, the defendant in execution. A claim was interposed by the said James W. Hill in the name of his infant daughter, Mary Hill, and as her next friend, and bond given to try the right of property agreeably to the statute. On the trial of the claim suit the claimant introduced two deeds as evidence, each of which conveyed a part of the negroes in controversy to the said James W. Hill, as trustee, for the sole and separate use and benefit of his said infant daughter, Mary Hill. The plaintiffs objected to the admission of these deeds, but their objection was overruled, and they excepted. The plaintiffs asked the court to charge the jury "that said deeds, if valid, conveyed the legal title to the slaves in controversy to the said James W. Hill, in whose name alone the claim to said slaves could be made or sustained; and that upon said evidence the jury could not find the issue for the claimant." This charge was refused and the jury told "that the beneficial interest being in Mary Hill, they might find for the claimant," to which plaintiffs excepted.

DARGAN, C. J.³ The sole question presented by the bill of exceptions is this: can the cestui que trust of personal property interpose a claim under our statute to try the right of property? I am fully satisfied that he can not. A court of law can look alone to the legal title. It cannot take cognizance of a trust; and looking alone to the legal title in the case before us, we find it in James W. Hill—not in the claimant; therefore her claim cannot prevail. * * * Judgment reversed and cause remanded.

² Where the holder of income bonds of a railroad payable to bearer secured by a trust mortgage, sued the railroad to recover interest without joining the trustee, it was held on demurrer that the trustee need not be a party to the suit. *Spies v. Chicago & Eastern Illinois Railroad Co.*, 24 Blatchf. 280, 30 Fed. 397 (1887).

³ Part of the opinion is omitted.

NIMS, Administrator, v. FORD and Trustee.

(Supreme Judicial Court of Massachusetts, 1893. 159 Mass. 575, 35 N. E. 100.)

LATHROP, J. The Berkshire Life Insurance Company, summoned as trustee of the principal defendant, in 1861, in consideration of a premium of forty dollars paid to it by Julia O. Ford, and of an annual premium of a like sum to be paid to it on or before a certain day in every year during the continuance of the policy, assured the life of said Julia, in the amount of one thousand dollars, for the term of life, "for the benefit of her husband," who is the principal defendant in this case. The policy contains the following clause: "And the said company do hereby promise and agree well and truly to pay or cause to be paid, at their office, the said sum insured to the above named party to whose benefit this insurance shall inure whenever the same becomes due, his executors, administrators or assigns."

It appears from the answer of the trustee that Mrs. Ford died in 1891, and that the company has in its possession the proceeds of the policy. The justice of the Superior Court who heard the case, has found that Mrs. Ford paid all the premiums due upon the policy from her separate funds; and that the trustee never promised to pay the principal defendant the sum due or to become due under the policy, unless such promise is contained in the policy itself. The justice ordered the trustee to be discharged, and the case is before us on an appeal from this order.

To charge the insurance company as a trustee, it is necessary for the plaintiff to show that the principal defendant has a legal cause of action against it growing out of the policy, as the company has no personal chattels in its possession belonging to the principal capable of being seized and sold upon execution. *Maine Ins. Co. v. Weeks*, 7 Mass. 438. *Field v. Crawford*, 6 Gray, 116.

A merely equitable right is not attachable by the trustee process. *Massachusetts National Bank v. Bullock*, 120 Mass. 86. See, also, *Folsom v. Haskell*, 11 Cush. 470.

In this case we fail to find any privity of contract between the principal defendant and the insurance company, or anything which would entitle the husband to maintain an action at law against the company on the policy. Mrs. Ford and the company were the contracting parties. The promise to pay to the husband was, by intentment of law, made with her and not with him. His interest was a purely equitable interest which, as we have seen, is not enough to cause the trustee to be charged. *Campbell v. New England Insurance Co.*, 98 Mass. 381, 400. *North America Co. v. Wilson*, 111 Mass.

542. *Bailey v. New England Ins. Co.*, 114 Mass. 177, 19 Am. Rep. 329. *Flynn v. Massachusetts Benefit Association*, 152 Mass. 288, 25 N. E. 716.¹

WESTERN RAILROAD COMPANY v. NOLAN and Others,
Board of Assessors of the City of Albany.

(Commission of Appeals of New York, 1872. 48 N. Y. 513.)

Appeal from judgment of the General Term of the Supreme Court in the third judicial district, affirming a judgment dismissing plaintiff's complaint.

The action was brought to restrain the defendants, as assessors of the city of Albany, from assessing the sum of \$500,000, for personal property, against Joseph C. Y. Paige and Thomas W. Olcott, trustees, for the purpose of taxation. The said sum was held by Paige and Olcott as trustees, under certain tri partite contracts, dated in 1840, 1841 and 1849, between the city of Albany of the first part, the Albany and West Stockbridge Railroad Company, (a corporation of the State of New York), of the second part, and the plaintiff (a corporation of the State of Massachusetts), of the third part. Under these contracts the city of Albany issued its bonds to the plaintiff for \$1,000,000, payable one-fourth in twenty-five years, one-half in thirty years, and the remaining one-fourth in thirty-five years from June, 1840, with interest coupons at six per cent. per annum, payable semi-annually; the plaintiff agreeing to apply one-tenth of the proceeds of the bonds to the creation of a sinking fund, to be held, managed and controlled by two trustees, one of whom should be the chamberlain for the time being of the city of Albany, and the other to be nominated by the plaintiff, who was required to keep the fund invested, together with an additional one per centum on the amount of the said bonds, to be contributed annually to the said fund by the plaintiff, and accumulate the said fund for the purpose of retiring the said bonds at maturity, paying the surplus to the said plaintiff. The residue of the proceeds of the said bonds the plaintiff agreed to apply to the construction of the Albany and West Stockbridge Railroad, which completed a through line of railroad communication from the eastern terminus of the plaintiff's railroad in Massachusetts to the city of Albany. The city of Albany also agreed to subscribe for \$1,000,000 in the stock of the Albany and West Stockbridge Railroad Company, to be held by said city in consideration of the issue of said city bonds, of which stock the plaintiff was to become

¹ An undisclosed principal is permitted to sue in his own name and at law to enforce a contract made with his agent. Dean Ames thinks that the undisclosed principal is a cestui que trust and the agent his trustee, and that, therefore, on principle, only the agent should be allowed to enforce the contract. *Cases on Trusts* (2d Ed.) p. 258, note 1.

the owner as fast as it retired the said bonds; and the agreement appears to contemplate that the plaintiff would become the lessee of the said West Stockbridge Railroad, until the plaintiff became the owner of said railroad by payment of the said city bonds; and the plaintiff also agreed to pay the interest on the bonds as it became due, as a rent for the use of the said West Stockbridge Railroad. This agreement was carried into effect; the said bonds were issued, and were outstanding at the commencement of the action; and the said sinking fund amounted, with all the annual payments of the plaintiff thereto, and the accumulations thereon to \$916,489.41, of which the said Paige and Olcott were then in possession and the actual trustees. This fund was invested by the trustees in the name of the plaintiff and the city of Albany, on bond and mortgage to the amount \$322,529, and the residue in the stocks of the State and general government, and in the bonds of the city and county of Albany, cash on hand, and bonds of the New York Central Railroad Company. The judge, before whom the action was tried without a jury, found that the defendants were assessors of the city of Albany; that, as such, they had determined that the said fund was liable to taxation, and in pursuance of their determination, had entered in the assessment roll of the said city the amount of \$500,000 for personal property in the names of Thomas W. Olcott and Joseph C. Y. Paige, trustees as aforesaid. That the plaintiff had no other property in the city and county of Albany, except office furniture of the value of fifty dollars. That the plaintiff had, in due time, presented to the defendants, as assessors, proof of the said facts, and requested them to strike the said assessment from the assessment roll, and the assessors declined to accede to it, but determined to assess the said fund for the purposes of taxation. That the defendants were not of sufficient pecuniary responsibility to respond to the plaintiff in damages if it should be determined that the said fund was not liable to taxation. That the plaintiff is a foreign corporation, created under the laws of the State of Massachusetts.

The plaintiff requested the judge to decide that the said fund was not liable to be assessed for the purposes of taxation, and that the plaintiff was entitled to an injunction restraining the defendants, as assessors, from assessing the said fund for taxation, and from assessing the said trustees for the said fund; that the said judge held and decided that the plaintiff was not entitled to the relief demanded, and adjudged that the complaint be dismissed with costs. The plaintiff duly excepted to such refusal to find as requested, and to the decision so made by the said judge.

The defendants thereupon entered judgment, dismissing the complaint, with costs.

LEONARD, C. While the plaintiff has an important interest in the sinking fund, it is not under its control or management, nor is the title to it vested in it. It has such an interest as would enable it to

compel an accounting by the trustees, or maintain an action against them for the correction of an abuse of the fund. The plaintiff has agreed to indemnify the city of Albany from injury by losses to the fund, and is thereby indirectly bound to maintain it, or to pay the bonds, amounting to \$1,000,000 with the interest; and the plaintiff is also entitled to the amount of the trust funds remaining, after the said bonds, with the interest, have been satisfied or paid. Perhaps it might maintain an action against third parties for the protection or defense of the fund, in case the trustee should, on request, refuse to institute the proper action or proceedings for that purpose. The plaintiff should be regarded as a cestui que trust, and interested in the said fund. The trustees are the parties in whom the fund is vested, and whose duty it is to maintain and defend it against wrongful attack or injury tending to impair its safety or amount. The title to the fund being in them, neither the cestuis que trust nor the beneficiaries can maintain an action in relation to it, as against third parties, except in case the trustees refuse to perform their duty in that respect, and then the trustees should be brought before the court as parties defendant. There is nothing in the case proving any refusal or reluctance on the part of the trustees to perform any duty which they ought to assume in vindicating the fund from illegal assessment or taxation. The plaintiff has not, for these reasons, made any case entitling it to bring this action.

MORGAN v. KANSAS PACIFIC RAILWAY COMPANY and
Others.

(Circuit Court, S. D. of New York, 1882. 15 Fed. 55.)

Bill in equity by the holder of certain coupons attached to income bonds of the Kansas Pacific Railway Company, for an accounting and a decree of payment. The plaintiff sues "on behalf of himself and all other holders of income bonds who may show themselves entitled to relief, and who shall in due time come in and ask relief by and contribute to the expenses of this suit." Lewis, the trustee of the bonds, was named as defendant to the bill, but was not served with process, and did not appear in the cause. The bill averred a request upon Lewis to bring this suit, but no proof of the averment was offered at the hearing.

BLATCHFORD, Justice. Benjamin W. Lewis is named in the bill as a defendant. Process of subpoena is prayed against him in the bill. The bill avers that "during the several years last past the defendant Benjamin W. Lewis has duly become sole trustee under said income mortgage," and "has been requested to bring an action for the accounting and injunction asked by the plaintiff herein, but he has neglected and failed to bring such action or comply with said request,

and he is, therefore, made a defendant in this action." The answer of the Kansas Pacific Railway Company admits that "during several years last past Benjamin W. Lewis has been the sole trustee under said income mortgage, but it has no knowledge or information sufficient to form a belief as to whether or not he has been requested by complainant to bring an action for the accounting and injunction asked by complainant herein." This raises an issue as to the request to Lewis.

Lewis, being the trustee under the mortgage, is the proper party plaintiff in a suit of this character, and some good reason must appear of record why he does not sue as plaintiff; and, in such case, he must be made defendant. The bill recognizes this necessity, and hence makes the averments referred to. The averment as to the request to Lewis is controverted, but it is not proved on the part of the plaintiff. It would be necessary to prove it, even though Lewis was served with process or appeared. It is not alleged in the bill that he is beyond the jurisdiction of the court, nor is that fact proved. The bill, it is true, describes Lewis as "of the city of St. Louis," and as "a citizen of the State of Missouri." But that is not sufficient. And even if it were shown that Lewis was not and could not be found within this district, to be served with process, there is nothing in section 737 of the Revised Statutes (U. S. Comp. St. 1901, p. 587), which makes it proper for the court to adjudicate the suit without the presence of Lewis, because the issue as to whether Lewis refused to sue, as stated, is one on which Lewis must be heard, and under section 737 he cannot be concluded or prejudiced by a decree rendered in his absence. The statute cannot be construed so as to convert real parties and necessary parties into no parties at all. There is, in this case no suit to adjudicate unless Lewis be plaintiff, or unless, if he be defendant, he be served or appear. Rule 47 in equity is to the same purport. It makes it discretionary with the court to proceed as does section 737.

For the foregoing reason, and without deciding expressly or impliedly any other question raised in the case, the only disposition that can now be made of the suit is to dismiss the bill, with costs, but without prejudice to any other suit in any court.¹

¹ See *Harlow v. Mister*, 64 Miss. 25, 8 South. 164 (1886); *Harvey v. McDonnell*, 113 N. Y. 526, 21 N. E. 695 (1889); *General Electric Co. v. La Grand Electric Co.*, 87 Fed. 590, 31 C. C. A. 118 (1898).

HORSLEY v. FAWCETT.

(In Chancery, before the Master of the Rolls, Lord Langdale, 1849. 11 Bevan, 565.)

In 1796, a benefit society, called the "Helpmates Society" was established, for securing annuities to aged persons, which was duly enrolled under St. 33 Geo. III, c. 54.

For the purpose of dissolving said society under said act, a deed of arrangement, dated October 6, 1823, was made between the annuitants of the first part, the next of kin and personal representative of the deceased annuitants of the second part, the subscribers of the society of the third part, and the plaintiff, Richard Horsley, and six other persons (since deceased), of the fourth part, whereby all the funds of the said society were vested in the plaintiff and the other parties thereto of the fourth part, upon trust, after payment of costs to divide the funds, as far as the same should extend, between the parties of the first, second and third parts respectively.

Upon the execution of this deed, it was arranged, that all monies received by the trustees should, for safe custody, be deposited in the hands of a banker.

Accordingly, another indenture, dated July 22, 1825, was made between Richard Horsley and the other trustees of the deed of October 6, 1823, of the first part, John Dixon, banker, of the second part the defendants, Fawcett and Williams, of the third part, and James Samuel Dane, an accountant, of the fourth part, whereby it was arranged, that all the money received by the trustees should, when received, be paid into the hands of Messrs. Dixon, the bankers; that Dane, the accountant, should make a report of the persons entitled to receive any part of the funds; and that Dixon & Co. should pay all cheques to such persons, which were to be drawn by Fawcett and Williams, and countersigned by Ernst and Reeve (two of the parties thereto of the first part). The trustees paid the funds amounting to £19,219. to Dixon & Co. and they were placed to the credit of an account entitled "the Helpmates Society Account." All but £700 was paid out upon cheques drawn as required by the deed of 1825.

October 14, 1828, Fawcett and Williams, together with Ernst and Reeve, invested this £700. in their joint names in the purchase of £809. 5s. consols and by investment of dividends, the sum increased to £908. 9s. 6d. After the death of Reeve and Ernst and on July 18 1845, Fawcett and Williams sold the stock and applied the proceeds £895. 11s. 11d. to their own use.

This bill was filed June 2, 1846, by Richard Horsley, the sole surviving trustee against Fawcett, Williams and the representatives of Reeve, Ernst and Dixon, praying an account of all the funds received by Dixon under the deed of July, 1825, and that Fawcett and

Williams might be declared liable for all sums paid out upon cheques improperly drawn and signed, and particularly the sum of £908. 9s. 6d. 3 per cents, and all sums improperly possessed, and that they might make good the same.

Fawcett, by his answer, took an objection, for want of parties, in the following form: "And this defendant says, that it appears by the complainant's amended bill of complaint, that all the members of the 'Helpmates Society,' who were members at the date and execution of the said indentures, and the legal personal representatives of such of them as have since died, are interested in the matters in question in this suit, and necessary parties thereto. And this defendant is advised and submits, that the said amended bill of complaint is defective for want of parties aforesaid."

THE MASTER OF THE ROLLS. If the object of this bill were to recover the fund, with a view to its administration by the Court, the parties beneficially interested must be represented. But it merely seeks to recover the trust monies, so as to enable the trustee hereafter to distribute them, conformably with the trusts declared. It is, therefore, unnecessary to bring before the court the parties beneficially interested.

Overrule the objection.¹

¹ The doctrine of this case generally prevails. Bills to recover the trust property from a person other than the cestui que trust: *Clark v. Fosdick*, 118 N. Y. 7, 22 N. E. 1111, 6 L. R. A. 132, 16 Am. St. Rep. 733 (1889); *Stevens v. Bosch*, 54 N. J. Eq. 59, 33 Atl. 293 (1895). Bills to foreclose: *Holmes v. Boyd*, 90 Ind. 332 (1883); *Rinker v. Bissell*, 90 Ind. 375 (1883); *Shaw v. Norfolk County Rd. Co.*, 5 Gray (Mass.) 162 (1855). Bills to redeem: *Boyden v. Partridge*, 2 Gray (Mass.) 190 (1854). Bills for specific performance: *Moale v. Buchanan*, 11 Gill & J. (Md.) 314 (1840); *Potts v. Thames Co.*, 15 Jur. 1004 (1851). Bills to set aside a fraudulent deed of land: *Lewis v. Whitten*, 112 Mo. 318, 20 S. W. 617 (1892). Bills to restrain a tort to realty: *Smith v. City of Portland (C. C.)* 30 Fed. Rep. 734 (1887). Bills to establish title under the burnt records act of Illinois: *Harding v. Fuller*, 141 Ill. 308, 319, 30 N. E. 1053 (1892). Bills to partition real estate: *Smith v. Gaines*, 38 N. J. Eq. 65, 69 (1884).

A contrary doctrine prevails in some jurisdictions. Bills to recover a trust fund: *Stillwell v. McNeely*, 2 N. J. Eq. 305 (1840); *Elmer v. Loper*, 25 N. J. Eq. 475 (1875). Bills to foreclose: *Chapman v. Hunt*, 14 N. J. Eq. 149 (1861); *Jewell v. West Orange*, 36 N. J. Eq. 403 (1883). If the cestuis are so numerous as to make their joinder inconvenient they may be dispensed with. *Willink v. Morris Canal & Banking Co.*, 4 N. J. Eq. 377 (1843); *Williamson and Upton v. New Jersey Southern Railroad Co.*, 25 N. J. Eq. 13 (1874).

When cestui que trust need not be joined as defendant with trustee.

Bills to deprive trustee of trust res: *Vetterlein v. Barnes*, 124 U. S. 169, 8 Sup. Ct. 441, 31 L. Ed. 400 (1888); *Kerrison v. Stewart*, 93 U. S. 155, 23 L. Ed. 843 (1876); *Wakeman v. Grover*, 4 Paige (N. Y.) 23 (1832). Contra, *Armstrong v. Armstrong*, 19 N. J. Eq. 357, 360 (1868); *Brokaw v. Brokaw*, 41 N. J. Eq. 215, 4 Atl. 66 (1886). Bills for specific performance: *Van Doren v. Robinson*, 16 N. J. Eq. 256 (1863). Bills to redeem: *Sweet v. Parker*, 22 N. J. Eq. 453 (1871). Contra, *Woodward v. Wood*, 19 Alabama, 213 (1851). Bills to dissolve a partnership: *Taylor v. Rockefeller*, Fed. Cas. No. 13,802, 18 A. L. R. (N. S.) 298 (1879).

In a bill to foreclose a mortgage upon the trust res, it is thought that the cestuis should be joined with the trustee, so as to raise the fund to prevent

ZIMMERMAN and Others, as Executors, v. KINKLE,
Impleaded, etc.

(Court of Appeals of New York, 1888. 108 N. Y. 282, 15 N. E. 407.)

Appeal from a final judgment of the General Term of the Supreme Court, in the first judicial department, in favor of the plaintiffs, entered upon an order made February 16, 1887, which reversed an order of the Special Term, sustaining a demurrer by defendant Kinkle to the complaint, and overruled said demurrer.

This action was in equity, for the cancellation of a bond and the restoration of \$5,000 belonging to the estate represented by the plaintiffs as executors, and which money they had placed in the hands of Kinkle, one of the defendants, to indemnify him against liability as surety upon the bond.

The complaint alleged in substance that the testator, William Zimmerman, in his lifetime, Emil Dieckerhoff, Louis Raffloer and Adolph Erbsloeh were co-partners in business, and that after the death of Zimmerman a settlement of accounts relating to firm transactions was had between the plaintiffs on one side and the defendant Emil Louis and Adolph on the other, in which the latter wrongfully exacted of the plaintiffs, and they, with the defendant George Kinkle executed a bond in the penal sum of \$5,000 to the said Emil, Louis and Adolph, upon condition that if the obligors should "keep in violate and confidential all the business transactions and dealings of the late co-partnership firm of Dieckerhoff, Raffloer & Co. and of Caron & Co., the predecessors of said first named firm, which may ever at any time, in any wise have come, or which may hereafter come to their knowledge, and shall also preserve and keep inviolate and confidential the contents of correspondence and other writing relating thereto, and shall not disclose or divulge the same, then the obligation to be void, otherwise to remain in full force and virtue" that Kinkle signed as surety and, as such, demanded and received from the plaintiffs the sum of \$5,000, to be repaid with interest as soon as his obligation upon the bond ceased; that the bond "was given for no consideration, but was wrongfully extorted from the plaintiffs and was signed, executed and delivered for an illegal and immoral purpose, against public policy and for the purpose of interfering with the administration of public justice, and to suppress evidence of illegal, wrongful and unlawful acts on the part of the obligees therein named, all of which said defendant, George Kinkle well knew"; that the money so demanded by Kinkle was trust-money and was "received by him from the plaintiffs as the executors and trustees of William Zimmerman, deceased."

foreclosure. *Francis v. Harrison*, L. R. 43 Ch. Div. 183 (1889). *Contra*, *Va Vechten v. Terry*, 2 Johns. Ch. (N. Y.) 197 (1816); *New Jersey Franklinite Co. v. Ames*, 12 N. J. Eq. 507 (1859).

The demurrer stated several grounds.

The Special Term sustained the demurrer upon the grounds (1) that the consideration of the bond was illegal and criminal, and so neither party could have relief; (2) that although an action might lie against Kinkle to recover the money received by him, with knowledge that it belonged to the estate, it could not be joined with an action against the obligees of the bond. The General Term reversed the order of the Special Term, with leave to answer over. The defendant did not accept that permission, and upon proof thereof final judgment was entered.

DANFORTH, J. There is nothing upon the face of the bond to impeach its validity, and whatever might be the real transaction between the parties it is to be made out by allegations and evidence. The terms of the complaint show clearly enough that the bond is founded on a consideration condemned both by morals and public policy, and, therefore, the defendant claims that a party to it cannot be relieved, but must be left to the consequences of the forbidden transaction. How this might be if the action were by the plaintiffs in their individual capacity, it is not necessary to inquire. They come into court as executors of a deceased person and in a representative character. If in delicto at all, they are not in *pari delicto*, and the enforcement of the rule would secure to the defendant the enjoyment of money which never belonged to his principals, and which did belong to the estate in the honest management of which the plaintiffs also owed a duty to the testator's beneficiaries. Nor should the defendant be heard to complain of this. He admits by his demurrer that the money was trust money and that he received it from the plaintiffs as executors and trustees. They had no power to part with it for the purpose for which he received it, and in seeking to recover it back they are merely performing a duty in the execution of which a court of equity may properly assist. The principle which justifies this conclusion, was applied in the recent case of *Wetmore v. Porter* (92 N. Y. 76), where it was held, that whoever receives property knowing it to be the subject of a trust and to have been transferred by the trustee in violation of his duty or power, takes it subject to the right, not only of the *cestui que trust*, but also of the trustee to reclaim possession or recover for its conversion. That case also holds that in such an action it is not necessary to bring the plaintiffs before the court in their individual character, and this answers the objection that the omission to do so in this action makes a defect of parties. In another aspect also the complaint is sufficient. It charges that the bond "was given for no consideration, but was extorted from the plaintiffs," and that the circumstances were also known to the defendant. The defendant argues that the averment as to the bond being wrongfully extorted from the plaintiffs, is a mere conclusion, and that no facts are stated. Against a demurrer the general statement is sufficient. It defines an unlawful

method or process by which an object is accomplished or end attained, and if not sufficiently definite or conclusive, the defendant's remedy was by motion. (*Marie v. Garrison*, 83 N. Y. 14.)

Nor does the complaint improperly join two causes of action. It narrates a single transaction in which all parties were concerned, and while more than one cause may appear entitling the plaintiffs to the relief sought, they only represent acts by the commission of which the right to relief is made out. That some might have been omitted and a cause of action remain, should not prejudice the plaintiffs. The object of the suit is single—to have the money restored to the funds from which it was taken. The right to that relief would follow from the cancellation of the bond, but the presence of Kinkle as well as that of the obligees was necessary to prevent further litigation and have the various interests of the parties determined in one action. This was the conclusion of the General Term.

The judgment appealed from should therefore be affirmed.

Judgment affirmed.

III. A CESTUI QUE TRUST OF AN OBLIGATION CANNOT DISCHARGE THE OBLIGOR.

COTTON v. COTTON and ASHTON.

(Before Lord Commissioners Trevor, Rawlinson, and Hutchins, 1693. 2 Vernon, 290.)

The plaintiff being executor and residuary legatee to her former husband, lends £100. to A. and B. and as security took a bond from A. and B. in the name of J. S. in trust for herself, and afterwards married B. one of the obligors, who died. The bill was to compel payment of £100.

It was insisted by defendant's counsel, that the bond being a trust for the wife, and she marrying one of the obligors, the marriage was a release of the debt, and it was extinguished, as it could have been in case the bond had been in her own name. *Sed non allocatur.*

OFFLY v. WARDE.

(King's Bench, 1668. 1 Levinz, 235.)

Debt on a single bill made to A. to the use of him and B. The defendant pleads a release made to him by B. On which the plaintiff demurs; and without difficulty, it was adjudged for the plaintiff, for B. is no party to the deed and, therefore, can neither sue nor release

it; but it is an equitable trust for him, and suable in the chancery, if A. will not let him have part of the money; and the book of Edw. IV cited, that he might release in such a case, denied to be law.¹

THOMASSEN, Guardian, v. VAN WYNGAARDEN and Others.

(Supreme Court of Iowa, 1885. 65 Iowa, 687, 22 N. W. 927.)

Action in equity to foreclose two mortgages. From the decree the plaintiff appeals.

SEEVERS, J.² The defendant Wyngaarden executed the following promissory note:

"\$1,400.

Pella, Iowa, November 11, 1878.

"Six years after date, for value received, I promise to pay to Jantie Van Wyngaarden, in trust for Gertruda Geradina Thomassen, Jana Thomassen, Wilhemina Thomassen, Johannes Thomassen and Jan Thomassen, heirs of Maarke Thomassen, deceased, or order the sum of fourteen hundred dollars, payable at the First National Bank, Pella, Iowa, with interest payable annually, at the rate of six per cent. per annum, from date until paid. Interest when due to become principal and draw ten per cent, and an attorney fee of ten per cent if suit is commenced on this note."

The mortgages were given to Jantie Van Wyngaarden in trust for the beneficiaries named in the note and it is provided in the mortgages that the mortgagor "shall pay or cause to be paid to the said Jantie Van Wyngaarden, in trust for the above named parties, her executors and administrators, or assigns, the sum of \$1400 with interest thereon from date, according to the tenor and effect of the promissory note above stated," then the mortgage to be void.

In March, 1881 Jantie Van Wyngaarden died and in June following a portion of the land described in the mortgage was conveyed to J. S. Polk, one of the defendants, and who bound himself to pay the amount of the mortgage, with interest from January 1, 1882. It was pleaded as a defence that the interest up to that time had been

¹ A release of an obligation by a cestui que trust having the entire beneficial interest would be effectual in equity. *McBride v. Wright*, 46 Mich. 265, 9 N. W. 275 (1881); *Galt v. Smith*, 145 Pa. 167, 22 Atl. 713 (1891). So in equity payment by the obligor to such a cestui will bar an action by the trustee. *Pratt v. Dow*, 56 Me. 81 (1868); *Smith v. Brown*, 5 Rich. Eq. (S. C.) 291 (1853).

A release of an obligation by the trustee in wrong of the cestui que trust was a good defense at common law. Equity would set aside such a release where the obligor had acted in bad faith. *Chicago & G. W. R. Land Co. v. Peck*, 112 Ill. 408, 443 (1885); *Insurance Co. v. Hutchinson*, 21 N. J. Eq. 107 (1870). In some jurisdictions courts of law treat such a release as a nullity. *O'Reilly v. Miller*, 52 Mo. 210 (1873). In other jurisdictions common-law courts will strike out the defense of such a release on motion. *Green v. Beatty*, 1 N. J. Law, 142 (1792).

² Part of the opinion is omitted.

paid. The mortgages provided that, in the event the interest was not paid as therein provided, then the whole debt became due. The beneficiaries are grandchildren of Jantie Van Wyngaarden, and are minors, and the plaintiff is their guardian. This suit was commenced in March, 1882 and the court found that there was nothing due at that time. * * *

I. Counsel for the appellant insist that there is no sufficient evidence showing that the interest due on the note up to January, 1882, has been paid. * * *

The defendants introduced in evidence a receipt in the following words, and proved that it was executed by the trustee:

"Pella, Iowa, December 22, 1880.

"Received of Jan Van Wyngaarden the sum of one hundred and forty-seven dollars, as interest on a certain note, secured by mortgage, to me given by the said Jan Van Wyngaarden in trust (for the beneficiaries above named); this being in full up to January 1, 1882.

"Jantie Van Wyngaarden."

Counsel for the plaintiff insist that the receipt is signed by the trustee as an individual, and therefore the beneficiaries are not bound thereby. But we think it fairly appears from the receipt itself that the money was received by the trustee as such. It was paid to and received by the person to whom it was payable by the terms of the note, and she will be charged as having received it in her capacity as trustee.

It is further insisted that at the time the receipt purports to have been executed but one year's interest, or \$84, was due, and that the trustee was not authorized to receive the interest not due, and that the beneficiaries are not bound by said receipt to any greater extent than the interest then due. For the reasons hereafter stated, we do not think this position is tenable.

Counsel further insist that the amount received, \$147, was less than the amount of interest due up to January, 1882 and therefore that the court erred in finding that the interest up to that time had been paid. It however is expressly stated in the receipt that the amount then paid was in full of such interest, and it is immaterial whether such amount was then paid or had been received at some prior time. In the absence of fraud or collusion, for the reasons hereafter stated, we think the trustee, as the legal owner of the note, could receive the interest due or to become due at such times and in such amounts as she saw proper; subject, however, to be held accountable at the instance of the beneficiaries for the faithful performance of the trust.

II. Counsel for the appellant insist that the trust created by the execution of the notes and mortgages is a simple or dry trust, and that the trustee in such a trust does not have the power to manage and dispose of the trust estate, and therefore the beneficiaries are not bound by what the trustee did. A simple or dry trust is defined to

be one "where property is vested in one person in trust for another, and the nature of the trust, not being prescribed by the donor, is left to the construction of the law." Perry, Trusts, § 520. "There can be but few of these dry trusts; for, when there is no control, and no duty to be performed by the trustee, it becomes a simple use, which the statute of uses executes in the cestui que trust, and he thus unites both the legal and beneficial estate in himself."

The trust under consideration is materially different; for it is so far declared as to cast on the trustee a duty for the performance of which she will be held accountable. It is made the duty of the trustee to receive and collect the interest and the principal when it becomes due. The legal title to the note and mortgages is vested in the trustee. It is her duty to preserve and protect the interest of the beneficiaries. But, in the absence of fraud or collusion, the trustee could satisfy the mortgages and acknowledge satisfaction of the debt, which would be binding on the beneficiaries. It is said that anyone dealing with the trustee must see that money paid in the discharge of the trust was properly appropriated; but we do not think this is so, for the simple reason that the trustee was the legal owner of the note, and authorized to receive payment of both the principal and interest. An administrator in one sense is a trustee for the estate he represents; and yet he is the legal owner of the notes and mortgages belonging thereto. A person making him a payment is not bound to see that the money is properly accounted for.

The rule, it seems to us, should be the same in the case under consideration.

The decree of the Circuit Court must be affirmed.

MAYER v. MORDECAI and Others.

(Supreme Court of South Carolina, 1869. 1 S. C. [N. S.] 383, 7 Am. Rep. 26.)

Before Carroll, Ch., at Charleston, March, 1868.

Under proceedings in the Court of Equity for Charleston District, one of the Masters, by deed, dated 29th May, 1860, assigned to the defendant, Benjamin Mordecai, five bonds, secured by mortgages of real estate, amounting, in the aggregate, to \$8000, and upwards, and about \$4000 in cash, to be held by him "in trust, to invest the cash aforesaid, and the proceeds of the bonds aforesaid, as soon as received, in such manner as the said Benjamin Mordecai may think proper, on consultation with the said Maurice Mayer, and Rachel M., his wife, and the same being so invested, then in trust to permit the said Maurice Mayer and Rachel M., his wife, to receive the interest and income of the said settled property" for their use "during their joint lives," with limitations over.

Thomas J. Kerr, Moses Goldsmith and Alonzo J. White, respective-

ly, were the parties obliged, in three of the five bonds, and these three bonds, amounting in the aggregate to about \$5000 were paid to Mordecai, in the years 1862 and 1863, in Confederate Treasury notes; and he invested the proceeds in notes and bonds of the Confederate States of America.

In the course of the year 1860, Mayer and wife removed their residence to the city of New York, and there remained until the close of the recent war between the United States and the late Confederate States of America. After June, 1861, and while the war continued, all communication between the belligerent sections was cut off. During this period the defendant Mordecai collected three of the bonds held by him as trustee, amounting in the aggregate to more than \$5000, and accepted payment in Confederate Treasury notes. The great bulk of the moneys so collected he received during the year 1863, and \$1940.58 of that amount as late as the 10th of November of that year. The proceeds of the bonds so received by him he invested in the public securities of the late Confederate States, \$3600 on the 23d July, 1863, in their 7.30 per cent. Treasury Notes, and \$2000 on the 10th November, 1863, in their 8 per cent. Treasury Bonds.

The Chancellor held that the defendant Mordecai had incurred no personal liability either by the collection of the bonds or by the investment of their proceeds in the public securities of the late Confederate States of America.

The plaintiff appealed.

MOSES, C. J.¹ When a trustee is not limited or directed by the instrument under which he acts, and is left to the discretion of his own judgment, our cases hold that his discretion must be exercised with the same diligence and care that a prudent man would bestow on his own concerns. * * *

What will constitute the care, and diligence thus exacted will depend on the attendant circumstances. If the act, in itself, was an incautious and imprudent one, it will not be sustained; and no aid derived from the fact that the trustee was countenanced in it by the participation of prudent men will give it sanction or support.
* * *

The collection of White's bond stands on a different footing from that of Kerr's and Goldsmith's. Payment of it was tendered to him in Confederate Treasury notes and we are to consider whether the acceptance of it, in such currency, under the circumstances, is consistent with the faithful discharge of the duty which he owed to those whose interests were confided to him in a fiduciary capacity, at a time when they were entirely incapable of contributing, by their presence or their counsel, to the protection of them. The bond was secured by a mortgage of real estate. According to the testimony, in May, 1862,

¹ Part of the opinion is omitted.

when the first payment in Confederate currency was accepted, such property was worth, in that currency, about fifty per cent. more than it would have brought in gold before the war; and, in May, 1863, when the second payment was made, it was worth three times as much. It was in evidence that, "no prudent person would have sold property in 1863 for the same amount, in dollars and cents, that he would have sold it for before the war, and receive payment in Confederate money, or bonds representing on their face that amount." With knowledge of all this, he accepted, in a currency which was not a legal tender, even under the Constitution or laws of the Confederate States, payment of the bond at the amount due on its face. To say nothing of the want of all obligation to receive such currency, can this act be recognized as one of ordinary prudence? The bond and mortgage, as a marketable article, were worth much more than he received. If he had sold them, they would have yielded a higher amount, and his fund for investment in the securities in which he appeared to have so much faith, although issued by a Government waging war against that in the territory of which his cestui que trusts were domiciled, would have been still larger. Regarded, even, as a mere business operation, it exhibits, to no small extent, the characteristics of neglect and indifference to his trust. * * *

What has been said in regard the bond of White, applies, with still more force, to those of Kerr and Goldsmith. The trustee, under the circumstances already referred to, invited or called them in, without any offer of payment from the obligors. It is said, in the decree, "that, having a trust fund in charge which he could not dispose of, as directed by the deed, he was for the time, substantially in the condition of a trustee with funds as to the investment of which the instrument creating the trust gives no directions at all."

Is it in his power to seek relief from such inability, when it arose, in a great measure, from his own voluntary act?

That he sold, during the war, his own residence, in Charleston, and invested largely in Confederate bonds, while it exhibits his great faith in the ultimate establishment of the Government whose currency he so much favored, may be accepted as the evidence of a patriotism so controlling as to absorb every selfish and interested motive. He could do as he pleased with his own, but he had not the right to risk, to the chances of the whirlpool, the means of others, entrusted to his care and protection.

Although the trustee is not discharged from liability to account for the three bonds, yet the mortgage, as against the original debtors cannot be set up as of force. The legal title to the bonds was in him, and with the investment of the proceeds they had no concern. If, according to the ruling in this State, a vendee is not bound to see to the application of the purchase money (*Lining v. Peyton*, 2 Desaus. [S. C.] 375; *Laurens v. Lucas*, 6 Rich. Eq. 217), or a mortgagee under the order of the Court, that the money is appropriated to the

purpose for which the mortgage was taken (*Spencer v. Bank of State*, Bail Eq. [S. C.] 468), much less can a debtor who makes satisfaction to the creditor, in a manner acceptable and agreed to by him, in the form of actual payment, be held to such requisition.

Mr. Justice Inglis, in *Austin v. Kinsman*, 13 Rich. Eq. (S. C.) 265, says, "a creditor, though entitled to demand payment in lawful money, may waive his right and accept any substitute he pleases and his voluntary acceptance of such substitute, as payment, makes it so."

If the satisfaction of the bonds was the result of a fraud between the debtor and the trustee, or induced by an improper combination, to the prejudice of the cestuis que trust, or if the debtor knew of the intended misapplication of the proceeds by the trustee, and in any way wrongfully facilitated the accomplishment of that design, the instruments would be set up as existing and binding. But no such proof has been made in the case. On the contrary, as to the two principal bonds, the trustee required the payment. There was no medium of circulation but Confederate currency. This the trustee might have rejected, but, so far from doing so, he sought payment in it. There is no testimony showing any willful combination on the part of White, Kerr or Goldsmith, with the trustee, that would justify an interference to hold them responsible for the act for which alone he should respond.

It is ordered and adjudged, that so much of the decree as dismisses the bill, as to the said White, Kerr and Goldsmith, and directs the payment of the costs, be affirmed.

That the decree of the Chancellor, as to the said Benjamin Mordecai, be set aside, and the case remanded to the Circuit Court, with instructions for an order directing him to account, as trustee under the said deed, on the principles hereinbefore set forth, and for all proper orders necessary and requisite to carry out the judgment of this court in the premises.

IV. WHEN CESTUI QUE TRUST'S EQUITABLE INTEREST MAY BE FORFEITED BY INACTION OR LACHES OF THE TRUSTEE CAUSING A FORFEITURE OF THE TRUSTEE'S LEGAL INTEREST.

MASON and MASON & DIBBLE, Plaintiffs in Error, v. MASON, Defendant in Error.

(Supreme Court of Georgia, 1863. 33 Ga. 435, 83 Am. Dec. 172.)

Demurrer, in Bibb Superior Court. The bill was filed April 12th, 1861. The court overruled the demurrer and the defendants except.

The complainant, Sarah Mason, formerly Sarah Brown, by her next friend, E. A. Nisbet, brought this bill against her husband, An-

drew J. Mason, and the firm of Mason & Dibble, composed of Timothy Mason and William Dibble. The bill stated that before her marriage a marriage contract was made between her and Andrew J. Mason without the intervention of a trustee by which all the property then belonging to her and all which she might be entitled to, at and by the death of her mother, should be her separate estate, and in no manner subject to her husband's debts, or disposition, save as provided for in the contract; that the contract gave the husband power, with the consent of complainant, to sell the property, the proceeds to become a portion of the trust estate, and be subject to the provisions of the contract; that on February 5th, 1850, her husband sold a negro, a part of the trust property, for \$800 cash, and loaned the money to Mason & Dibble, taking their promissory note therefor dated February 5, 1850, payable to himself as trustee for complainant, or bearer and due one day after date; that Mason & Dibble received said money with full knowledge that it was raised by sale of the negro and that the negro was trust property; that her husband had been insolvent for years. The bill prayed that another trustee be appointed and that Mason & Dibble account with complainant for the amount due on said note, and pay the same to the trustee appointed, to be by him held for the uses and trust declared in the marriage settlement.

Defendants demurred specially because the bill on its face showed that the note was barred by the Statute of Limitations at the time the bill was brought.

JENKINS, J.¹ * * * 2. But there is, in the second ground of demurrer, a far more serious obstacle in the way of the complainant. * * * It was conceded in the argument that as between the trustee (payee of the note) and the makers, it is so barred. * * *

This is a case, in which the feme covert is seeking to enforce rights, under a simple contract, between her trustee and a stranger, authorized by the deed of trust, and which contract is actually barred by the statute of limitations, and no special equity is alleged avoiding the bar. It is not her contract. She was incapable of contracting when it was made. She had a legal representative, appointed by herself, before she became covert, and in anticipation of coverture, authorized to make such contract. By him the contract was made, long subsequent to her coverture, and against him the statute commenced running so soon as the contract matured. The bar was complete before she asserted her equity, and in its assertion, she alleges no fraud, no special circumstances modifying the action of the statute of limitations upon the legal contract. * * *

The following points were also presented: "Cestui que trust can follow the property in the hands of a purchaser, with notice of the trust. If trustee fail to do his duty, or violate his trust, and sell

¹ Part of the opinion is omitted.

the property, both he and his privy are liable to cestui que trust. Purchasers with notice are privies to the trustee."

This is all good law, in its place, but has no application here. Mason & Dibble had no connection whatever with any sale, rightful or wrongful, of the negro. The trustee presented himself to them with a certain fund which he said belonged to the trust estate, and which complainant now says belonged to it. As such, they borrowed it, giving a promissory note, payable to the trustee. We have said that, according to the allegations in the bill, that was a legal transaction, in no way violative of the trust. Upon that simple contract, then rests their liability. If that be barred by the statute, without any erroneous practice on their part, their liability is at end. No constructive trust is raised by the bill between complainant and Mason & Dibble; there is certainly no express trust.

The statute of limitations runs as between cestui que trust and trustee on the one hand and strangers on the other. Hill on Trustees, 736 and 738. That is this case, and on this special demurrer we reverse the judgment of the court below.²

MORRIS and Others v. MURPHEY & COMPANY.

(Supreme Court of Georgia, 1895. 95 Ga. 307, 22 S. E. 635, 51 Am. St. Rep. 81.)

Petition for injunction. Before Judge Hunt. Upson County. October 20, 1894.

ATKINSON, Justice.³ In 1878 a judgment was obtained, and in 1879 an execution issued thereon. In 1882 another judgment by a different plaintiff was recovered against the same defendant. In 1893 the execution issued on the older judgment was levied on certain land as the property of the defendant in execution, and he, between the date of the rendition of the judgment and the date of the levy, having died, the administrator upon his estate filed an affidavit of illegality to the execution, on the ground that the judgment which was the basis of plaintiff's execution was dormant and that the same had not been revived within the time allowed by law. Two other executions, in all respects similar to the one then proceeding, were issued in favor of the same plaintiff; but we do not deem it necessary to set out in detail all the entries thereon nor proceedings thereunder, as the same questions are involved with reference to each, and may be fairly stated in our discussion of the questions arising upon a consid-

² Molton v. Henderson, 62 Ala. 426 (1878), cestui a lunatic; Williams v. Otey, 8 Humph. (Tenn.) 563, 47 Am. Dec. 632 (1847), cestui an infant.

If the trustee, however, be an infant, the statute of limitations will not run against the cestui though the latter be sui juris. Clayton v. Rose, 87 N. C. 106, 110-111 (1882).

³ Part of the opinion is omitted.

eration of one of them. The illegality thus filed came on to be heard; and, the administrator neither appearing in person nor by counsel, the court, upon tender of issue by the plaintiff in execution, after hearing evidence, rendered a judgment overruling the affidavit of illegality, the effect of which was an adjudication in favor of the validity of the judgment upon which said execution was issued. Afterwards, the plaintiff seeking to enforce this judgment, the plaintiff in the junior execution above referred to, but whose judgment had in the meantime become dormant, though the time allowed by law in which it might be revived had not then elapsed, instituted equitable proceedings and sought thereunder to enjoin the enforcement of the judgment and execution then proceeding against said estate, upon the same grounds that were made and set up in the affidavit of illegality so filed by the administrator. Upon the hearing of the application, the court granted an injunction. There were certain affidavits introduced upon the hearing, and as well certain documentary evidence; but as the questions which control this case arise upon the facts hereinbefore stated, the consideration of this additional evidence is not necessary to a correct determination of this case.

1. The grant of this injunction and the exception to its allowance present for the adjudication of this court the question as to whether all creditors of an estate, either by judgment or otherwise, are so far in privity with an administrator thereof as that a judgment in favor of one of such creditors against the administrator is conclusive upon all questions adjudicated thereby as between himself and other creditors. It is a well recognized and universal rule of law, that judgments unexcepted to and unreversed are, upon all matters which were or ought to have been adjudicated thereby, conclusive as between the parties thereto and their privies in estate. * * * The administrator is in law the personal representative of the deceased. He is, for all practical purposes involving the administration of his affairs, a legal substitute for the deceased. Clothed as a trustee with the duty of administering all the assets which may come into his hands, and applying the same under the statute of distributions, it is his duty to represent the estate in any litigation in which it may become involved, to prosecute suits in favor of and defend suits against the estate he represents. He is the party chosen of the law to whom these interests are committed. No person other than he, for or on behalf of the estate, can in his own name as matter of right prosecute or defend a suit in which his estate is interested as plaintiff on the one hand or defendant on the other. The administrator with respect to such matters stands upon the same footing as the deceased. It will not be seriously insisted that a judgment rendered against a person in his lifetime, with due notice of the pendency of the action, fairly rendered, and to which no exception was by him taken, could thereafter be called in question by a creditor of such person. No more

can it justly be said that his estate would not be equally bound where a judgment, under similar circumstances, has been rendered against his administrator. In contests which arise between the administrator and third persons who are indebted to the estate, the administrator represents all persons who may be interested therein, either as heirs or creditors. As against persons preferring claims against the estate, the administrator likewise stands as the representative of the estate and its interests, for and on account of heirs at law and all other creditors. Through him alone can they reduce to present possession any of the credits or assets of the deceased, or make the same available for the purpose of distribution. If this were not true, and on the contrary each individual creditor and heir at law were authorized in his own name to bring suits and collect assets, no man could afford to submit to a judgment rendered against them at the suit of an administrator; because the acquiescence therein might subject him to further suit at the instance of any other person who might conceive that he had a claim against the estate. So persons indebted to the estate could never pay the administrator, for fear some outside creditor, upon his own account, might bring a suit against him. To hold that each individual creditor might upon his own behalf proceed with the collection of his debt from the debtors of the estate without the intervention of the administrator, would involve the whole affair in the most inextricable confusion; for if one creditor could so assert his right outside of the administrator, another could do so, and a man who was so unfortunate as to find himself the debtor of an estate, would in every individual instance be compelled to file a bill of interpleader to determine whether he should pay the money and who was entitled to receive it. The law avoids all this confusion by nominating the administrator in advance as the stake-holder, and compels creditors through him, as against the estate and its debtors, to enforce their demands. It is only through the administrator that a creditor can compel the payment of debts due the estate, for the reason that there is no direct privity between individual creditors and debtors of an estate. The only privity existing between the administrator and a debtor of the estate is such as results from the pre-existing relation between the intestate and the debtor, and privity of some sort is essential to the maintenance of an action. Inasmuch as it is the duty of the administrator to collect the assets of the intestate, and inasmuch as outside creditors are not authorized to interfere with the collection of such assets, it is the corresponding duty of the administrator to defend all suits that may be brought against the estate. It thus being his duty for and on account of the estate to prosecute and defend such suits as its interest might seem to require, and he being not only a proper but an indispensable party thereto, it were ill to say that the judgment would have no binding force as against the estate. If it be binding upon the estate, it must of necessity be bind-

ing upon creditors who could have no interest except such as was derived from their privity with the administrator. An outside creditor, if he can do so at all, can only interfere as a party in such litigation when he shows that, because of some wrongful act of the administrator, his debt is likely to be imperilled. So that in this case it was the duty of this administrator, when a creditor of the estate sought to subject this land under a pre-existing judgment to the payment of his debt, and when he conceived that he had good cause for so doing, to have filed this affidavit of illegality. It was his duty to have prosecuted it to a successful determination, if that could have been accomplished. Failing in that, the judgment overruling the affidavit of illegality must be taken as binding upon the administrator upon the point made in that affidavit; and inasmuch as no person other than the administrator has any right to interfere, then this complainant cannot be heard to impeach the judgment with which the administrator was himself satisfied. Of course this whole argument proceeds upon the idea that this judgment was fairly rendered. If the administrator and one creditor permit a collusive judgment to be taken which may operate as a fraud upon other creditors, they may for that reason impeach and set it aside. Such creditors may also have their election to proceed against the administrator and his bondsmen. But in this case there is no intimation that this judgment is void for any such reason. If, without collusion with the plaintiff in execution who is a creditor, the administrator negligently permit a judgment to be rendered against him to the prejudice of the other creditors, then the administrator and his bondsmen might be answerable to such creditors. So far, however, as this record discloses, the administrator filed this affidavit of illegality in good faith, intending to insist upon it, but simply, for some reason not disclosed by the record, failed to be present when it was tried and did not except to the rendition of the judgment thereon. He is simply in the situation of a defendant in execution who has permitted judgment to be rendered against him by default. For this reason alone a judgment cannot be impeached or set aside. If void for any other reason, that reason must be alleged and proved. The effect of this disposition of the affidavit of illegality is to adjudicate that the judgment which was enjoined was, as against the attack made by the equitable petition, a valid subsisting judgment and entitled according to its priority to participate in the distribution of this estate. Upon this question the administrator, in behalf of all concerned, had been fully heard, and we hold that both heirs and creditors are concluded.² * * *

² While this is not a case of technical trust, yet the principle involved is the same.

V. THE OWNER OF THE LEGAL TITLE, NOT OF THE EQUITABLE INTEREST—THAT IS, THE TRUSTEE, NOT THE CESTUI QUE TRUST—
CAN VOTE AS OWNER OF TRUST RES.

In the Matter of the NORTH SHORE STATEN ISLAND FERRY
COMPANY.

(Supreme Court, General Term, Second Judicial District, 1872. 63 Barb. 556.)

Appeal from an order made at a Special Term, setting aside and declaring null and void an election of directors of the North Shore Staten Island Ferry Company.

George W. Wilson died April 15, 1872. His widow, Adele M. Wilson, and Mortimer L. Fowler were on April 23, 1872, appointed administratrix and administrator. The North Shore Staten Island Ferry Company was a corporation incorporated by chapter 135, Laws of 1853 of the State of New York, with a capital stock of 12,500 shares. At the death of George W. Wilson 5528 of said shares stood in his name. May 2, 1872, the annual election of fifteen directors was held. Fowler attended and produced a certificate of the Surrogate of the appointment of Mrs. Wilson and himself as administratrix and administrator and endorsed on said certificate a power of attorney from Mrs. Wilson to Fowler to vote said stock at said election. He offered to vote said stock and objection was made (1) that Fowler's name as administrator did not appear on the transfer book; and (2) that George W. Wilson was not the real owner of the stock standing in his name and he was refused the right to vote said stock. Certain persons were declared elected directors. Had not Fowler's vote been rejected none of said persons except one would have been elected.

An order was made to show cause why the election should not be set aside and a new election of directors had. The Special Term adjudged that the inspectors erred in not receiving the vote of Fowler and set aside the election and ordered a new one.

On appeal the Special Term order was affirmed.

GILBERT, J. The statute under which this company was incorporated (3 Edm. Stat. p. 872) provides that the stock of the company shall be deemed personal estate (section 10), and that each stockholder shall be entitled to as many votes as he owns shares of stock in said company (section 4).

Upon the death of Mr. Wilson, the intestate, and the appointment of Mr. Fowler and Mrs. Wilson as administrators of his goods, etc., and their acceptance of the trust, the latter became, by operation of law, vested with the legal title to the stock in question, and consequently stockholders of the company, representing the estate of the

decedent. As such they had all the rights appertaining to the ownership of the stock, one of which was the right of voting at elections of directors of the company. (*People v. Tibbets*, 4 Cowen, 364. *Bailey v. Hollister*, 26 N. Y. 112. *Middlebrook v. Merchants' Bank*, 3 Keyes, 135.)

No formal transfer on the books was necessary to give this right.

The fact that the decedent held the stock subject to a trust or duty in favor of others does not affect the question.

The right to vote follows the legal ownership, and the corporation has nothing to do with the equities between the owner and third persons.

Upon the death of a trustee of personal property, the trust devolves upon his representative. And as to everybody except the cestui que trust, the latter is absolute owner. (*Bunn v. Vaughan*, 3 Keyes, 345. *Ex parte Willcocks*, 7 Cowen, 402, 17 Am. Dec. 525.) As trustee, however, he owes the duty of active management for the protection and preservation of the trust estate. Where that consists of stock in a corporation the duty of voting at elections of directors thereof is too plain for argument.

The order appealed from should be affirmed, with costs.

VI. THE TRUSTEE, NOT THE CESTUI QUE TRUST, HAS THE BURDENS OF OWNERSHIP.

In re NORWEGIAN CHARCOAL IRON COMPANY. MITCHELL'S CASE.

(In Chancery, before the Master of the Rolls, Sir John Romilly, 1870. L. R. 9 Eq. Cas. 363.)

The Norwegian Charcoal Iron Company, Limited, was registered under the Companies Act, in 1862, on the 1st of September, 1864. James Mitchell applied for and obtained an allotment of 100 shares and he paid £700. in respect of calls thereon.

On the 6th of August, 1865, he executed a transfer of 80 of those shares, for a nominal consideration, to Francis Henry Vandyke, who was at the time an infant, and a clerk in the office of Mr. George Forster, a stock broker, and the transfer was duly registered. There was some evidence to show that at this time the shares might have been sold in the market for value, but it was contended that the object of the transfer was to escape liability. It was a matter of dispute whether the transfer was out and out, Vandyke alleging that he took the shares simply as trustee for James Mitchell, and upon an express promise by him that the shares should in a short time be

taken out of Vandyke's name. James Mitchell died in May, 1866. On the 13th of September, 1866, Vandyke attained the age of twenty-one years. Shortly afterwards legal proceedings were taken by the company for the purpose of recovering from Vandyke the arrears of calls due on his shares, and he being in pecuniary difficulties, and having no means of meeting the company's demands, applied to William Mitchell, one of the executors of James Mitchell for assistance, and received some small sums of money from him. Vandyke alleged that these sums were given to enable him to keep out of the way of proceedings by the company, and to suspend taking any steps to repudiate the shares until some arrangement could be come to with reference thereto; William Mitchell, on the other hand, alleged that the sums were given out of charity. Subsequently further applications were made to him on behalf of the company for payment of the calls on the shares; but he neither paid the calls nor took any steps to repudiate his liability in respect thereof.

On the 22d of June, 1868, the 80 shares were declared forfeited for non-payment of calls.

By a resolution passed the 28th of June, and confirmed on the 9th of July, 1868, it was resolved that the company should be wound up voluntarily.

Two summonses were taken out, one by Vandyke and the other by the liquidator, seeking to rectify the register by substituting the names of the executors of James Mitchell as the holders of these 80 shares for the name of Vandyke.

By the articles of association the directors were empowered to reject the transfer only in the case of the transferrer being indebted to the company. At the date of the transfer to Vandyke, James Mitchell was not so indebted.

The Court was of opinion that Vandyke was a trustee for Mitchell; and that the company were aware, when they registered the transfer, that Vandyke was an infant, and also that there was some arrangement between him and Mitchell with respect to the shares.

LORD ROMILLY, M. R. In this case certain shares are taken by an infant and are transferred to him. The company have full opportunity of knowing that he is an infant, and, in fact, they know everything about him. After he attains the age of twenty-one he is perfectly well aware that these shares are standing in his own name, and he remains for two years doing nothing whatever, receiving applications from the company, but never repudiating the shares. Now I have held that if a person becomes adult, either immediately after the winding-up or immediately before, and takes no step, that he cannot be blamed for so doing, because he cannot tell whether the company intend to enforce their claim against him and, that therefore he is not bound, till some steps are taken, to resist his being a shareholder in the company; that when he remains for two years and is

constantly applying to the executors of the person who had transferred the shares to him, he is bound to tell the company that he repudiates the shares and will have nothing to do with them.

Then I think the contention of the official liquidator fails in this respect. The distinction is very properly drawn between a person who wants to get rid of his shares because the company happens to be a failing company, and a person who wishes to put them in the name of a trustee. This takes place not unfrequently in many of these companies, as the company refuses to acknowledge any trusts. Now, Mr. Mitchell takes these shares and transfers a large number of them (80 I think) into the name of the infant, with the knowledge of the infant, the infant being perfectly aware of it, and allowing the thing to be done. I have considered the question whether he could repudiate them or not, but now comes the question whether that is a valid transaction. For that purpose the question of infancy does not arise; it is the same question exactly as it would be between two adult parties. One person may, if he pleases, become a trustee for another. He knows the consequences of so doing. He knows that he becomes personally liable for the calls, and that he is personally liable to be made a contributory. There are two sets of rights; one is as between himself and the person whom I may call the *cestui que trust*, and the other is as between himself and the company. As between himself and the company he is a shareholder and a contributory and cannot resist anything; but as between himself and the person for whose benefit he agreed to take them he has a right over as against him; that is to say, he has a right to call upon him who is the real owner of the shares to make good any sums of money which he may have to pay for the calls or for contribution or the like. Consequently he may be entitled to come against Mr. Mitchell's estate to make good anything which he will have to pay in the course of this liquidation to the company; but that does not prevent him from being the contributory to the company, or from, in his own person, making good those sums which he may be properly called upon to pay; and the company cannot come against the person in whose name they do not stand by reason of an assignment made between two other persons which they have not opposed or resisted, and of which they know a great deal. Whether they could have opposed it at the time is not the question now.

The result is, that I must keep him on the list of contributories as he remains at present, and that I must dismiss the application.

O'MALLEY, Defendant in Error, v. GERTH and Others, Plaintiffs
in Error.

(Court of Errors and Appeals of New Jersey, 1902. 67 N. J. Law, 610, 52 Atl. 563.)

In Tort. On error to the Essex County Circuit Court.

FORT, J.¹ The defendant in error is a policeman of the City of Newark. While on duty, on the 29th day of April, 1900, he was passing through Campbell Street and stepped on a cover over a coal-hole. The cover turned and he fell astride it into the hole and was seriously injured.

The premises in front of which the coal-hole was were the property of Julius Gerth in his lifetime. By his will this property was made a part of the residue of his estate, and was left in trust to his executors to let and rent it and to collect the rents accruing from the same, and, after paying taxes, insurance, repairs and other charges, to pay the net surplus to the testator's widow. The executors have a power of sale. The three defendants are named as executors in the will, and all qualified.

The accident occurred through the faulty condition of the coal-hole, owing, undoubtedly, to the spreading of a cracked flag-stone in which the rim of the lid or cover rested. Because of the enlargement of the hole the lid at times would get in a position where it would slip in the hole and turn upon its edge from pressure, and it did so when the defendant in error stepped upon it. Whether the defendants had knowledge of this condition of the hole and lid, and whether they had failed to repair within a reasonable time after notice thereof, was left to the jury as a question of fact which they must find in the affirmative before the verdict could be for the plaintiff. They so found.

The additional lines of defence relied upon were: * * *

Second: That the damage resulted from a defect in the sidewalk, and that the City was charged with its repair, and it alone was liable for injuries resulting from non-repair.

Third: That if the defendants were liable, they could not be held as individuals, but only as executors or trustees, their title to the property being solely one of trust. * * *

The second proposition is not tenable. Even if the City could be made liable in a case like this, it is still an undoubted legal rule that the owner of the premises, or the occupant thereof, or both, are liable. The maintenance of a trap like this upon a sidewalk in front of one's premises is a nuisance. Busw. Per. Inj. § 187; Cooley, Torts, 748; Davenport v. Ruckman, 37 N. Y. 568; Durant v. Palmer, 5 Dutcher (N. J.) 544.

¹ Part of the opinion is omitted.

Nor is the position that the defendants in this case cannot be held as individuals sustainable.

The cases cited by counsel for the defendants were cases where receivers of railroads appointed by the court were sued as individuals for injuries happening to passengers or others upon trains operated under the receivership and within the line of their duty. The case of *Cardot v. Barney*, 63 N. Y. 281, 20 Am. Rep. 533, which was of this character, was relied upon by the defendant's counsel to sustain his contention. In *Kain v. Smith*, 80 N. Y. 458, that case was distinguished from cases of the class before us, and the rule in the class of cases where the trust is one voluntarily assumed is fully stated. A party having independent control is liable for the acts of persons under his control whether of contract or tort. *Rogers v. Wheeler*, 43 N. Y. 598.

Trustees for the benefit of bondholders of a railway who assume duties under the terms of their trusteeship are personally liable for torts arising from negligence or misconduct of the employees operating the road under them. *Sprague v. Smith*, 29 Vt. 421, 70 Am. Dec. 424.

The fact is unimportant that the defendants were acting as trustees, or in a representative capacity, in the care or control of the property. An action in a case of this kind lies against them as individuals. Whether they may have indemnity out of the trust estate is of no concern as to third parties. *Mason v. Pomeroy*, 151 Mass. 164, 167, 24 N. E. 202, 7 L. R. A. 771; *Odd Fellows v. McAllister*, 153 Mass. 292, 297, 26 N. E. 862, 11 L. R. A. 172.

Judgment unanimously affirmed.²

MAYOR AND CITY COUNCIL OF BALTIMORE v. STIRLING AND RIDGELY, Trustees.

(Court of Appeals of Maryland, 1868. 29 Md. 48.)

Appeal from the Superior Court of Baltimore City.

Suit by Baltimore City to recover \$1101.91 alleged to be due by the defendants, as trustees, of the estate of Nicholas G. Ridgely for the benefit of Eliza E. Ridgely during her life for city taxes for the years 1863, 1864 and 1865. The trustee, Ridgely, resided in Baltimore County, and the other trustee, Stirling, was a resident of Baltimore City. This suit was instituted to determine whether the taxes in question were payable to the appellant or to the Commissioners of Baltimore County, both claiming them.

² The trustee, and not the cestui que trust, is indictable for a nuisance. *People v. Townsend*, 3 Hill (N. Y.) 479 (1842).

A pro forma judgment was entered by agreement for the defendants and the plaintiff appealed.

BRENT, J., delivered the opinion of the court.¹

This court in the case of *Latrobe v. Mayor and City Council of Baltimore*, 19 Md. 13, having settled the doctrine, that the residence of the trustee, and not that of the cestui que trust decides the situs for taxation upon property of the description mentioned in the record, the only question presented by this appeal arises from the fact, that in this case there are two trustees, one of whom resides in Baltimore City, and the other in Baltimore County.

The tax laws of the State do not expressly provide for such a case and our decision must be made to rest upon what we regard to be equity and right. The property is certainly not liable to a double tax. If the whole of it were taxable in Baltimore City, under the authority of *Latrobe v. the Mayor etc. of Baltimore*, it would, under the same authority, be also taxable in Baltimore County. This cannot be. We think it should be taxed one-half as of the place of residence of each trustee,—that is, one-half should be taxed to the trustee residing in Baltimore City and the other half to the trustee residing in Baltimore County. * * *

Judgment reversed.

¹ Part of the opinion is omitted.

CHAPTER III.

TRANSFER OF THE RESPECTIVE INTERESTS OF
TRUSTEE AND CESTUI QUE TRUST.SECTION 1.—BY ACT OF THE PARTY.¹

I. BY ACT OF THE TRUSTEE.

VAVASOUR, J., said that the subpoena began in the time of Edward III; but this was always against the feoffee upon confidence himself, for against his heir the subpoena was never allowed until the time of Henry VI and in this point the law was changed by Fortescue, Chief Justice.—Keilwey, 42, pl. 7.

If the feoffee makes a feoffment over the feoffor has no remedy against his feoffee; the same law if he dies, the heir of the feoffee is seized, as it seems to me, to his own use, for the confidence which the feoffor put in the person of his feoffee, cannot descend to his heir, nor pass to the feoffee of his feoffee, but he is feoffee to his own use as the law was taken until the time of Henry IV; but if the second feoffee has notice of the use those in the chancery will reform this at this day by subpoena and the heir of the feoffee upon confidence was seized to his own use until the commencement of the reign of Edward IV (Henry IV?) and then commenced the subpoena against the heir and against the feoffee of the feoffee.—Keilwey, 46, pl. 2, per Frowike, J.

BROOKE'S ABRIDGEMENT, FEOFFMENTS AL. USES, fol.
329, pl. 10.

Replevin. The defendant avowed for a rent charge, for that J. D. and J. B. were seized of 40 acres of land in fee to the use of R. N. by the gift of R. and granted a rent to Alice, the wife of R., for

¹ In connection with the cases in this section the student should read an article by Dean Ames, "Purchaser for Value without Notice," 1 Harvard Law Review, 1.

her life with clause of distress and he distrained and avowed this as a distress from the land charged. The plaintiff said that J. D. and J. B. were seized in fee to the use of W. N. and granted the rent to the said Alice, she having notice of the said use and J. D. and J. B. enfeoffed H. and then W. N., the cestui que use released to said H. his right in the land, without this that J. D. and J. B. were seized to the use of the said R. N. And the defendant demurred in law to the bar to the avowry and the question is whether the rent shall be to the use of the cestui que use as the land was or to the use of the grantee. By Pollard, Brook and Fitzherbert, Justices, the rent shall be to the use of the cestui que use and then the release of the cestui que use to the feoffees extinguished the rent by the Statute of 1 Rich. III, which provides that the release of the cestui que use shall be good against him and his heirs, and the feoffees and their heirs. * * * Per Fitzherbert, J. If a man makes a feoffment without consideration, the feoffee shall be seized to the use of the feoffor or to the use to which the feoffor was seized. * * * Per Brook, J. If a feoffee to use make a feoffment upon consideration to him who has no notice of the use, that shall change the use. * * * Pollard, J. Feoffees to use enfeoff others without consideration, this is to the first use, but if made upon consideration and to him who has no notice of the use the use is changed. (14 Hen. VIII, 4.)

ROBES v. BENT AND COCK.

(In Chancery, before Lord Keeper Egerton, 1599. Moore, 552.)

In chancery the case was this. Robes purchased a copyhold of inheritance in the name of Bent and another in trust, Robes himself being a villain. Bent surrenders his moiety to the use of his son, the other died seized. The son of Bent and the heir of the other for money sold the copyhold which was worth £80. for £50. to Cock who had no notice of the trust. Robes sued by subpoena the son of Bent and the heir of the other and also Cock. It was determined by Egerton, Lord Keeper, that Robes should recover the £50. of Bent and the heir of the other and that Cock should hold in peace. But if notice had been proved in Cock, Robes should have had the land. No recompense for the excess of value was given against the vendors, because no fraud. And Egerton vouched a case of 34 Hen. VI of which he had a copy from the tower that a feoffee to use sold the land and died; and a decree in chancery was made by advice of all the judges of England that the cestui que use should have the money of the executors of the feoffee.

HARRISON v. FORTH.

(In Chancery, 1695. Precedents in Chancery, 51.)

The Master of the Rolls [SIR JOHN TREVOR] was of opinion in this case, that if A. purchases an estate, with notice of an incumbrance, or that it is redeemable, and then sells it to B. who has no notice; who afterwards sells it to C. who has notice; that by this, the first notice to A. the first purchaser, is thereby revived, and that C. the last purchaser shall be liable to the incumbrance or redemption, as if it had never been in the hands of one who had no notice.

Afterwards, on appeal to my Lord Keeper [SIR JOHN SOMERS], it being urged, that in such case an innocent purchaser without notice may be forced to keep his estate, and cannot sell it, and shall be accountable for all the profits received ab initio, his Lordship held, that though A. and C. had notice, yet if B. had no notice, the plaintiff could not be relieved against the defendant C., and ordered C. to be examined on interrogatories, if he ever saw the conveyance from the plaintiff to her sisters, and then to be tried if the defendant C. paid any, and what consideration for the lands; and if B. had notice at the time of his purchase that it was redeemable; for if he had not, the plaintiff could not be relieved, though A. and C. had notice.

BOVEY v. SMITH.

(In Chancery, before Lord Chancellor Nottingham and Lord Chief Justice North, 1682. 1 Vernon, 60.)

A trustee having sold the land to a stranger, that had no notice of the trust and a fine with proclamations and five years past, the trustee afterwards, for valuable consideration really paid purchases these lands again of the vendee. And it was decreed by the Lord Chancellor with the concurring opinion of the Lord Chief Justice North, that the trustee notwithstanding the fine, proclamations, and non-claim for five years, should stand seized in trust as at first, as if the land had never been sold nor any fine levied.¹

¹ If the trustee in parting with the title to the trust res commits no breach of trust, and subsequently reacquires title to it, he will hold the same free from any obligation to his cestui que trust. *Creveling v. Fritts*, 34 N. J. Eq. 134, 135 (1881).

If a trustee in breach of trust transfers the trust res to a donee who has no notice of the trust, and the donee transfers the property while still ignorant of his donor's fraud, he is not accountable to the cestui que trust for the value of the property. *Bonesteel v. Bonesteel*, 30 Wis. 516 (1872). He may also purchase the property from a subsequent bona fide purchaser for value and hold the same free from any obligation to the cestui que trust. *Mast v. Henry*, 65 Iowa, 193, 21 N. W. 559 (1884).

The common statement that a bona fide transferee without value of the trust res is in the same position as if he had notice of the cestui's rights, therefore, needs some qualification.

TOURVILLE v. NAISH.

(In Chancery, before Lord Chancellor Talbot, 1734. 3 P. Wms. 307.)

A. purchased an estate, and having paid down a part of the purchase money, gave bond for the residue. The plaintiff had an equitable lien on the purchased premises, of which the defendant alleged he had no notice at the time of making his purchase, but was apprised thereof before payment of the money due on the bond. And it was contended that this notice was not material since the giving of the bond was as payment; and the purchaser, after he had given his bond for payment of the purchase money, is bound at all events to proceed, and cannot plead at law that there is any equitable incumbrance on his purchased premises.

LORD CHANCELLOR. If the person who has a lien in equity on the premises, gives notice before actual payment of the purchase money, it is sufficient; and though the purchaser has no remedy at law against the payment of the residue, for which he gave his bond, yet he would be entitled to relief in equity, on bringing his bill and, showing, that though he has given his bond for payment of the residue of his purchase money, yet, now he has notice of an incumbrance under which circumstances the court would stop payment of the money due on the bond.

WIGG v. WIGG.

(In Chancery, before Lord Chancellor Hardwicke, 1739. 1 Atkyns, 382.)

Lands descended to the heir-at-law subject to an equitable charge and he sold them to a purchaser for a valuable consideration. In a suit by those having the equitable charge the question was, whether this was a continuing charge on the lands in the hands of the purchaser.

LORD CHANCELLOR. I think the plaintiffs have a strong case both for their legacies and interest.

There are three questions:

First, if the plaintiffs have any continuing charge on the lands.

Secondly, if they are proper to come into this court.

Thirdly, if there is sufficient notice to affect the purchaser.

[The first two questions were answered in the affirmative.]

As to the third question, of notice to the purchaser, it appears he had notice, for though he had no notice before he paid his money, yet he had notice before the execution of the conveyance, and it is all but one transaction.

DIXON v. HILL, and Another.

(Supreme Court of Michigan, 1858. 5 Mich. 404.)

Error to Calhoun Circuit.

August 2, 1856, Arza Lewis made a general assignment for the benefit of creditors to George H. French, which was fraudulent upon its face as it authorized a sale of the assigned property on credit. French on September 24, 1856, agreed to sell the property to Hill & Mahoney, who were to pay down \$250 and give their joint note for \$250 payable in three months and for the balance their notes in four equal payments, at twelve, eighteen, twenty-four and thirty months and were to take possession the next morning. They so took possession and began the inventory and sale of the goods.

October 3, 1856, Dixon, as Sheriff of Calhoun County, on a writ in favor of Culver, Foote and Wilkie attached the goods in the possession of Hill & Mahoney. Hill & Mahoney had then paid French nothing and had given no notes. After the attachment the \$250 were paid and the notes given. Hill & Mahoney replevied the goods from the Sheriff.

On the trial of the replevin suit, the Sheriff having justified under the attachment, the court charged the jury: "That if the jury should find that the plaintiffs obliged themselves to pay French, the assignee, the purchase price of the goods in question, whether by writing or parol, the possession having been given to the plaintiffs, that would be a valuable consideration." To this defendant excepted. Verdict for plaintiffs, judgment thereon and writ of error by defendant.

CAMPBELL, J.¹ No one but a purchaser for a valuable consideration can claim title to property which has been fraudulently assigned, against the action of an attaching creditor. Such purchasers are protected upon the equitable principle that they should not be deprived of that which they have honestly, and without notice of any fraud, bought and paid for in fair dealing with the person holding the legal title. But the consideration must, in all cases, be actually passed before notice. Unless payment has been actually made in some shape, the authorities are quite clear that the purchase will not be upheld. In equity, a purchaser is protected to the extent of the payments actually made,² and no further, even where future payments are provided for, unless those are secured in such a manner that the purchaser cannot be relieved against them. This could only happen where he gives negotiable paper; for upon a debt not negotiable, the failure of title would exonerate him. * * * In the case before us, no consideration whatever had been paid or secured. Such a

¹ Part of the opinion is omitted.

² In some jurisdictions the purchaser may keep the property bought, subject to a lien for the unpaid purchase price in favor of the equitable incumbrancer. *Hardin's Executors v. Harrington*, 11 Bush (Ky.) 367, 374 (1875).

purchase cannot avail, either at law or in equity, against the remedies of creditors. The court erred in making the charge in favor of its validity. Judgment reversed and new trial granted.

SAUNDERS v. DEHEW.

(In Chancery, before Lords Commissioners, Sir John Trevor, Sir William Rawlinson, and Sir George Hutchins, 1692. 2 Vernon, 271.)

Anne Bayly, being possessed of a term for years, makes a voluntary settlement thereof, in trust for herself for life, remainder to her daughter Isabella Barnes for life, remainder to the children of Isabella, by Mr. Barnes, her then husband. Isabella, for £200., mortgages the lands in question to the plaintiff, who pretends he had no notice of the settlement; Isabella in the mortgage deed, being called the daughter and heir of John Bayly. The plaintiff hearing of it gets an assignment of the term from the trustees.

PER CURIAM. Though a purchaser may buy in an incumbrance, or lay hold on any plank to protect himself, yet he shall not protect himself by the taking a conveyance from a trustee after he had notice of the trust, for by taking a conveyance with notice of the trust, he himself becomes the trustee, and must not, to get a plank to save himself, be guilty of a breach of trust. And the plaintiff's bill being brought against the children of Isabella to foreclose them, the court refused so to do, saying, if he might be suffered to protect himself, by thus getting in the legal estate, they would not carry it on by a decree in equity to foreclose.

GOSHEN NATIONAL BANK v. WILLIAM BINGHAM and Others.

WILLIAM BINGHAM and Others v. GOSHEN NATIONAL BANK.

(Court of Appeals of New York, Second Division, 1890. 118 N. Y. 349, 23 N. E. 180, 7 L. R. A. 595, 16 Am. St. Rep. 765.)

Appeals from judgments rendered by the General Term of the Supreme Court in the first judicial department, entered upon orders made March 31, 1887, which affirmed a judgment in the action first above entitled in favor of the defendants and a judgment in action second above entitled in favor of plaintiffs, both of which were entered upon the reports of a referee.

On November 27, 1884, Benjamin D. Brown applied to the cashier of the Goshen National Bank, appellant, at Goshen, N. Y., to cash a sight draft for \$17,000, drawn by him upon the firm of William

Bingham & Co. of New York, the individual members of which firm are the respondents, accompanied by a quantity of the bonds of the West Point Manufacturing Company, of the face value of \$17,000. Brown represented that he had negotiated a sale of these bonds at their face value with William Bingham & Co.; that they had directed him to draw upon them at sight for \$17,000, the draft to be accompanied by the bonds, and that the draft would be paid upon presentation. Such representations were absolutely false. The bonds had no market value. Brown was a bankrupt and had no funds in the bank except such as resulted from the credit given him upon the faith of the draft on Bingham & Co., accompanied by the bonds. The cashier of the Goshen National Bank, relying upon such representations, cashed the draft for the \$17,000, and placed the proceeds to the credit of Brown upon the books of the bank. He gave Brown sight drafts on New York for \$12,000, and certified a check drawn by Brown to his own order, dated November 26, 1884, for \$5,000. On the morning of November 28th, Brown called at the office of William Bingham & Co., and stated that he wanted to get some currency. Mr. Bingham passed the check to the firm's cashier directing him to give Brown currency for the amount. The cashier gave him a check drawn on the Corn Exchange Bank for \$5,000. Brown had the check cashed at the Corn Exchange Bank. He also had the New York drafts cashed, amounting to \$12,000, which he had obtained from the Goshen National Bank. After procuring the checks and drafts to be cashed, he fled to Canada where he remained at the time of the trial of these actions. When Bingham & Co. took from Brown the check certified by the Goshen National Bank it was not indorsed.

The referee found in the action second entitled that "at the time of the transfer of the said certified check by Brown to the plaintiffs, it was intended both by Brown and the plaintiffs that said certified check should be indorsed by Brown, and it was supposed by both parties that he had so indorsed it, and if the plaintiffs had known that it was not indorsed they would not have paid the consideration therefor."

He found in the action first entitled, "that Brown made no statement to the defendants, or to either of them at the time of the transfer of the check that such check was indorsed."

And "prior to the commencement of the action of replevin the defendants never requested Brown to indorse said check."

While Bingham & Co. held the check in question unindorsed, a demand for its return to the bank, accompanied by a full explanation of the circumstances under which the certification was obtained, was made upon Bingham & Co., in behalf of the bank and upon their refusal to return it, an action to recover its possession was commenced by the bank against Bingham & Co.

That action is, firstly, above entitled.

Subsequently, and on December 16th, Bingham & Co. obtained from Brown a power of attorney to indorse the check. Pursuant thereto the check was indorsed and payment thereafter demanded of the bank.

This was refused, and thereupon the action, secondly above entitled, was commenced by Bingham & Co., to recover the amount of the check.

PARKER, J.¹ As against Brown, to whose order the check was payable, the bank had a good defense. But it could not defeat a recovery by a bona fide holder to whom the check had been indorsed for value. By an oversight on the part of both Brown and Bingham & Co. the check was accepted and cashed without the indorsement of the payee. Before the authority to indorse the name of the payee upon the check was procured and its subsequent indorsement thereon, Bingham & Co. had notice of the fraud which constituted a defense for the bank as against Brown. Can the recovery had be sustained?

It is too well settled by authority, both in England and in this country, to permit of questioning, that the purchaser of a draft or check, who obtains title without an indorsement by the payee, holds it subject to all equities and defenses existing between the original parties even though he has paid full consideration, without notice of the existence of such equities and defenses. * * *

This rule is only applicable to negotiable instruments which are negotiated according to the law-merchant.

When, as in this case, such an instrument is transferred but without an indorsement, it is treated as a chose in action assigned to the purchaser. The assignee acquires all the title of the assignor and may maintain an action thereon in his own name. And like all other choses in action it is subject to all the equities and defenses existing in favor of the maker or acceptor against the previous holder.

Prior to the indorsement of this check, therefore, Bingham & Co. were subject to the defense existing in favor of the bank as against Brown, the payee.

Evidence of an intention on the part of the payee to indorse does not aid the plaintiff. It is the act of indorsement, and not the intention, which negotiates the instrument, and it cannot be said that the intent constitutes the act.

The effect of the indorsement made after notice to Bingham & Co. of the bank's defense must now be considered. Did it relate back to the time of the transfer, so as to constitute the plaintiffs holders by indorsement as of that kind?

While the referee finds that it was intended by both Brown and the plaintiffs that the check should be indorsed, and it was supposed that he had so indorsed it, he also finds that Brown made no state-

¹ Part of the opinion is omitted.

ment to the effect that the check was indorsed; neither did the defendants request Brown to indorse it. There was, therefore, no agreement to indorse. Nothing whatever was said upon the subject. Before Brown did agree to indorse the plaintiffs had notice of the bank's defense. Indeed, it had commenced an action to recover possession of the check.

It would seem, therefore, that having taken title by assignment, for such was the legal effect of the transaction, by reason of which the defense of the bank against Brown became effectual as a defense against a recovery on the check in the hands of the plaintiffs as well, that Brown, and Bingham & Co., could not, by any subsequent agreement or act, so change the legal character of the transfer as to affect the equities and rights which had accrued to the bank. That the subsequent act of indorsement could not relate back so as to destroy the intervenient rights and remedies of a third party.

This position is supported by authority. * * *

The views expressed especially relate to the action of Bingham & Co. against the bank and call for a reversal of the judgment.

We are of the opinion that the action brought by the bank against Bingham & Co. to recover possession of the check cannot be maintained and in that case the judgment should be affirmed.

JONES v. POWLES.

(In Chancery, before the Master of the Rolls, Sir John Leach, 1833. 3 Mylne & Keen, 581.)

By indentures of lease and release, dated respectively the 21st and 22d of December, 1800, John Jones, a hatter in Hereford, mortgaged a freehold house and premises, situate in High Street, in that city, of which he was seized in fee, to William Holbrook and his heirs, to secure the sum of £200., advanced to him by Holbrook, with interest.

John Jones paid off the mortgage and all arrears of interest in the month of August, 1808, and at the same time took from Holbrook a memorandum, which was indorsed upon the mortgage deed, acknowledging such payment; but he never obtained a reconveyance of the property, and at the time of his death, which took place in the month of May, 1814, the legal estate in the mortgaged premises remained outstanding in Holbrook. Immediately upon the death of John Jones, one Benjamin Meredith, who had been his shopman and assisted him in his business, produced and proved in the proper Ecclesiastical Court an instrument purporting to be the will of John Jones, by virtue of which he obtained undisturbed possession of the messuage and premises comprised in the mortgage. This instru-

ment was in the following words: "The will and testament of John Jones, latter, dated September 12, 1802. I do hereby will and bequeath, after all my just debts and funeral expenses are paid, the whole of my real and personal property to my assistant Mr. Benjamin Meredith. In testimony of which witness my hand: John Jones. Witnesses: John Cowmeadow, Henry Hill, Thomas Jones

Meredith, shortly after the death of John Jones, had occasion to borrow a sum of £300. from one Hall, upon the security of the property in question; and, accordingly, in consideration of £300. lent to Meredith by Hall, Holbrook, as trustee of the legal estate for Meredith, and at his request, joined with Meredith in a deed, dated the 2d of February, 1815, by which the messuage and premises in High Street were conveyed to Hall, his heirs and assigns, subject to redemption upon payment of the £300. and interest.

Meredith died in the month of April, 1815, having devised the equity of redemption of the mortgaged premises to his wife Susannah in fee; and by divers mesne conveyances the title to that equity of redemption became in the month of March, 1821, vested in a person of the name of James Jones in fee.

In the month of October in that year, one Watkins, at the request of James Jones, paid off the £300. then due upon the mortgage to Hall, and, in consideration of the money so paid, the mortgaged premises were, at the same time, conveyed by Hall and Jones to Watkins subject to redemption by Jones, on payment of the £300. and interest; and that sum was, by a subsequent transaction in September 1822, increased to £600.

Soon after the period of the last mentioned transactions, James Jones and Watkins having entered into copartnership, they applied to John Powles for a loan of £450., and Powles having advanced the money, Watkins with the consent of his partner Jones, deposited with Powles the mortgage deed, and all the title deeds relating to the property, by way of security for his advances. Powles having afterwards lent them further sums, he was eventually let into possession as mortgagee, and he continued in possession until the month of April, 1828, when he died, leaving the defendant, Sarah Powles, his widow, whom he appointed as executrix, and to whom he devised all his mortgages and trust estates.

Upon the death of her husband, Sarah Powles entered into possession, and made further advances to Jones and Watkins, on the security of the same property, to the amount, in the whole, of £2000. and in the month of September, 1830, James Jones and Watkins, by a deed which recited that Sarah Powles had contracted for the purchase of this estate for £1200., and that she was to retain that sum in part discharge of the moneys due to her from Jones and Watkins: it was witnessed that, in consideration of £1200. and of the discharge given by Watkins to Jones from the £600. due to him, Watkins an

Jones conveyed and released the house and premises to Sarah Powles, her heirs and assigns, forever.

In the month of July, 1831, the present bill was filed by David Jones and Sarah his wife, against Sarah Powles. The bill alleged that John Jones died intestate, leaving the plaintiff, Sarah Jones, his heiress-at-law; that John Jones never made any will duly executed and attested to pass real estate by devise, and that the signature and the attestations of the witnesses to the pretended will were forged or fictitious; and it prayed that the plaintiffs might be permitted to redeem the estate, on payment of what should be found due in respect of the mortgage; and also, if necessary, that an issue might be directed for the purpose of trying whether John Jones made any valid devise of the property in question.

The defendant having put in her answer, setting forth her title, as it has been already stated, the plaintiffs filed a supplemental bill, in which they detailed the history of the several mortgage transactions, as before mentioned, and alleged that the defendant was in possession and enjoyment of, and claimed to be entitled to the premises not as mortgagee, but as absolute owner under the forged will. The supplemental bill further stated that, at the instance of the plaintiffs, the administration with the pretended will annexed, obtained by Meredith, had been declared void by the Ecclesiastical Court, and fresh letters of administration granted to the plaintiff, Sarah Jones. It then charged that the defendant had notice of the forgery, and prayed the same relief as if these matters had been stated in the original bill.

The defendant, by her answer to the supplemental bill, admitted that the mortgage to Holbrook was paid off in the life time of John Jones, but that the legal estate was not reconveyed at his death; and she claimed to be entitled to absolute ownership of the house and premises, as a purchaser for valuable consideration, without notice of the forgery; and she denied the title of the plaintiff Sarah Jones, as the heiress-at-law of John Jones.

At the hearing of the cause the Master of the Rolls directed that the bill should be retained for twelve months, with liberty to the plaintiffs, in the meantime, to begin an action of ejectment to recover possession of the premises; and the defendant was not to set up the Statute of Limitations, or the legal estate in the premises, which was outstanding in William Holbrook at the death of John Jones, and which had subsequently been conveyed to the defendant.

An action of ejectment was accordingly brought, and was tried at the last Spring assizes for the county of Hereford, when the plaintiffs recovered a verdict, having fully established, by their evidence, that the pretended will of John Jones was a forgery, and that the plaintiff Sarah Jones was his heiress-at-law.

The evidence in the cause established that, in the month of July,

1825, notice was given to John Powles, the mortgagee, and the defendant Sarah, his wife, by a solicitor acting on behalf of a party who claimed to be the heir of John Jones, that he had received instructions to institute legal proceedings for the purpose of setting aside the will, on the ground that it was a forgery.

The cause now came on for further directions upon the equity reserved.

THE MASTER OF THE ROLLS. The defendant is a purchaser for valuable consideration from persons claiming title under Meredith, who entered into possession of the property in question, as the devisee of Jones the rightful owner.

The legal estate was outstanding in a satisfied mortgagee under Jones; and the mortgagee, by direction of Meredith, whom he believed to be such devisee, conveyed the legal estate to Hall, by way of better security to Hall for money advanced by him, by way of mortgage, to Meredith. Meredith died in possession having devised the property to his wife, who devised to the parties under whom the defendant claims as a purchaser for valuable consideration. The conveyance to Hall by the satisfied mortgagee of Jones, recites the fact of the mortgage, and that it was satisfied, and that Meredith was the devisee of Jones, and that the conveyance of the legal estate to Hall was made by the direction of Meredith. Meredith, therefore, and those who claim as volunteers under him, could have no title against the plaintiff as heir at law of Jones.

The question is, whether the defendant, claiming as a purchaser for valuable consideration without notice of the plaintiff's title as heir, can protect herself by the legal estate which she has acquired by the conveyance from Hall.

My impression at the opening of this case was, that the protection of the legal estate extended only to cases where the title of the purchaser for valuable consideration without notice was impeached by reason of some secret act or matter done by the vendor, or those under whom he claimed; but upon full consideration of all the authorities which have been referred to and the dicta of judges and text-writers, and the principles upon which the rule is grounded, I am of opinion that the protection of the legal estate is to be extended, not merely to cases in which the title of the purchaser for valuable consideration without notice is impeachable by reason of a secret act done, but also to cases in which it is impeached by reason of the falsehood of a fact of title asserted by the vendor or those under whom he claims, where such asserted title is clothed with possession; and the falsehood of the fact asserted could not have been detected by reasonable diligence.

This is the situation in which the defendant stands. There was no reasonable ground for suspicion that the will was forged; a long

possession had followed the alleged devise, and no reasonable diligence could have lead to a discovery of this forgery.

I must therefore declare, that as to all sums of money advanced by the defendant on the security of this property previously to notice of the forgery, she is to be considered as a purchaser for valuable consideration without notice; and the accounts between the parties must be taken upon that principle.

DUEBER WATCH CASE MANUFACTURING COMPANY v. DAUGHERTY and Others.

(Supreme Court of Ohio, 1900. 62 Ohio St. 589, 57 N. E. 455.)

Error to the Circuit Court of Stark County.

This was a suit by plaintiffs below claiming to be pledgees of certain stock, against the company issuing it, for a sale of the stock and an application of the proceeds to their claim, the company itself claiming to own the stock and refusing to recognize the plaintiffs' right to it by a transfer of it on the books of the company. Judgment was rendered in the common pleas in favor of the plaintiffs, which on error, was affirmed by the Circuit Court. On November 23, 1891, the plaintiffs, Daugherty and Michner, for the accommodation of John A. Coburn and James W. Dulaney, endorsed a note for \$1000, payable to the City National Bank of Akron. Coburn agreed and promised at the time, in order to secure the plaintiffs against loss, that he would transfer and assign to them a certain certificate of stock he then owned in the company. On January 7, 1892, he did assign and transfer the stock to the plaintiffs with authority to have the same transferred to them on the books of the company. The plaintiffs were compelled to pay the note and have been only partially indemnified; and there is still due them something over \$200.

The company by answer and cross petition stated in substance that the corporation had transferred without consideration to Coburn four shares of its stock so as to qualify him to act as a director; that this stock was to be surrendered when his services as a director were not required; that he had left the State of Ohio and ceased to be eligible as a director because of nonresidence in the state; that he had promised to return and reassign said stock, but had failed to do so; that before plaintiffs acquired said stock they knew it belonged to the defendant. The defendant prayed that the stock be declared to belong to it and that plaintiffs be declared to have no interest in it and be ordered to transfer the same to the defendant.

The evidence clearly disclosed that whilst at the time the note was given and the agreement to transfer the stock was made, November 23, 1891, the plaintiffs had no knowledge of the claim of the company to be the equitable owner of the stock, yet at, and some time

before, it was transferred to them by assignment they had such knowledge.

The claim of the company was that Coburn was simply a nominal share holder, with no real interest whatever in the stock held by him.

MINSHALL, J.¹ These questions arise upon the case: 1. Did the agreement to transfer give to the plaintiffs any equitable interest in the stock? 2. If so, was their equity superior in merit to that of the company? 3. Did the assignment of the stock made January 7, 1892, with knowledge of the claim of the company, give them a superior right to the latter, though the equities were equal? 4. Can the company, under the circumstances disclosed by the answer, be heard to make a claim to the stock against an innocent third person? * * *

2. The question then arises, was this equity superior to that of the company based on the agreement with Coburn for a reassignment of the stock? It is the undoubted rule that as between equities that are equal in merit, the one that is prior in point of time is prior in right. So that before the priorities of competing equities can be determined, their respective merits must be considered, and if it be found that the latter equity is superior in this regard, it must be awarded priority in right. *Hume v. Dixon*, 37 Ohio St. 66; *Campbell v. Sidwell*, 61 Ohio St. 179, 55 N. E. 609. * * *

Whilst every case must be decided upon its own peculiar facts, and it will be difficult to give a more definite rule than is given in *Hume v. Dixon*, adopting the principle of that case and the solution of this one is not difficult. For purposes of its own, and which we need not here comment upon, it placed the legal title to the stock in question in Coburn. He held a certificate to the effect that he owned it. On the faith of what this certificate purported and on the promise to transfer it in a week as collateral security, the plaintiffs accommodated the principals on the note by becoming their sureties. The principals have not fully indemnified them. Unless they are permitted to avail themselves of this collateral they may suffer a loss. To permit, under the circumstances this secret equity, if it may properly be termed one, to be asserted as prior in right to that of the plaintiffs, tends to shock the natural sense of justice. One who, for his own purposes, places the legal title to his property in another, must take the hazard of any loss that may result from his dealing with it as his own, so far as innocent third persons are concerned. On principles of natural justice his equity is inferior to that of any person who acquires in good faith any title to the property.

3. It is now generally conceded that the assignment of a certificate of stock with power of attorney to have it transferred on the books of the company, gives to the assignee the status of a legal owner of the stock. It conforms to the practice and general understanding of

¹ Part of the opinion is omitted.

the commercial world. Pomeroy, Eq. § 710; *Railway Co. v. Bank*, 56 Ohio St. 351, 383, 47 N. E. 249, 43 L. R. A. 777. Hence, on January 7, 1892, when the stock was assigned by Coburn to the plaintiffs and delivered to them, they became clothed with what is regarded as the legal title, or in other words, held as against the company a title by estoppel to the stock superior to any right of the company to set up in its own favor a secret equity. Cook on Stockholders, § 416. It is true that at this time they had knowledge of the claim of the company, but had no such knowledge at the time the agreement was made for the transfer. And here it will be observed that the claim of the company was not that of an innocent purchaser for value. Its claim is that of a mere equity for a reconveyance, prior in time, to the equity of the plaintiffs. The contest is simply between equities. In such cases the settled doctrine is stated by Pomeroy to be, "That if a second or other subsequent holder, who would otherwise be postponed to the earlier ones, obtains the legal estate, or acquires the best right to call for the legal estate he thereby secures an advantage which entitles him to priority. It is absolutely essential, however, that he should have acquired his equitable interest without any notice of the prior claims." Pomeroy, Eq. §§ 727, 729; Adams, Eq. 161, 162. The language of the last author is: "It has been already stated that in order to avoid the postponement of the latter equity, freedom from notice is indispensable. The notice, however here referred to, is a notice existing at the acquirement of the equity, not a notice at the completion of the right. The latter purchaser or incumbrancer, on payment of his money, becomes an honest claimant in equity, and is entitled, if he can, to protect his claim. But he is not bound to look for protection until he has ascertained that danger exists; and his right to obtain it will continue, notwithstanding the institution of a suit to settle the priorities of the conflicting claimants." The plaintiffs seem to be clearly within the rule here stated. They had no knowledge of the company's claim when they acquired their equity, and had a right to protect it by taking an assignment of the stock for that purpose, which they did on January 7, 1892, though at the time they had knowledge of the company's claim. This gives to them an unquestioned priority over the company, and the right to a sale of the stock for the satisfaction of their claim. *Gibler v. Trimble*, supra [14 Ohio, 323]. This case clearly supports the doctrine that where the equity is acquired without notice, the owner may protect himself against an earlier equity by acquiring the legal title, though, at the time of so doing, he had notice of the earlier equity.²

² The discussion of the first and fourth questions is omitted. The court affirmed.

DODDS v. HILLS.

(In Chancery, before Vice Chancellor Sir W. Page Wood, 1865. 2 Hemming & Miller, 424.)

The plaintiff was a married woman (suing by next friend), upon whom certain shares in the Whittle Dean Water Company had been settled for her separate use. The shares stood in the name of Henry Hills, as sole trustee having formerly stood (as the share certificate showed) in his name jointly with that of another person.

On the 19th of September, 1857, Hills obtained an advance from the defendant, Smith, out of the funds of a club of which Smith was secretary; as security for which he executed a transfer of the said trust shares, and handed the same, together with the certificate of the shares, to Smith. He also gave a promissory note to the treasurer of the club.

Further advances were made by Smith, partly out of the funds of the same and another club of which also Smith was secretary, and partly out of his own moneys; and it was verbally arranged between Hills and Smith that the shares should be held by Smith as security for these further sums. The security of the shares appeared to have been given to Smith personally to indemnify him, and not directly as a security to the clubs. At the time when these advances were made, Smith had no notice of the trust, or that the shares were not the absolute property of Hills. Hills regularly received the dividends, and paid them over to the plaintiff.

On the 7th of June, 1863, Hills absconded; and on the 30th of June a petition in bankruptcy was filed, under which he was declared bankrupt.

On the 14th of June, 1863, the plaintiff and her husband informed Smith that Hills held the shares upon trust for the plaintiff.

On the 19th of June, 1863, Smith sent the transfer, with the certificate, to the secretary of the company for registration, and the shares were on the following day registered in the name of Smith.

The Whittle Dean Water Company was constituted by act of Parliament, with which the Companies Clauses Consolidation Act was incorporated.

The bill prayed that the transfer of the shares might be set aside; or, in the alternative, that the plaintiff might be let in to redeem.

Vice Chancellor Sir W. PAGE WOOD.¹ It is impossible to give the plaintiff any relief against this transfer. It is a case of great hardship upon the plaintiff; but the defendant Smith does not appear to me to be in any way answerable for that. The shares stood in the name of Hills apparently as absolute owner; and he purported, as such owner, to transfer them to Smith by way of security. There is some obscurity in the evidence, as to whether Smith took the

¹ Part of the opinion is omitted.

shares as representing the different clubs; but the real effect of the evidence is, I think, that the security was given personally to Smith himself, which somewhat simplifies the case. After the transfer was given to Smith, Hills continued to receive the dividends; and the arrangement seems to have been this: Smith, being responsible to his societies for the money, required Hills to give him by way of indemnity, such a power over the shares as would enable him, Smith, whenever he pleased, to make himself legal owner. That Hills did, by executing a transfer, and Smith allowed him to remain on the register and receive the dividends as long as he made no default in respect of the advances, being content as mortgagee with the power given to him of registering the transfer. When this arrangement was made, Smith had no notice of the trust; and, after having received notice, he registered the transfer. At the time of the transfer he acquired the power to register himself as owner of the shares. Hills could not displace the equity thus acquired, nor was anything further necessary to be done on his part to complete the transaction. Although it is true that, as between him and the company, Smith did not become the owner until after registration, nothing but his own act was necessary to make him complete master of the shares. His position was like that of a person to whom an estate is conveyed, to become legally vested on the performance of some condition, such as the making of a demand, or the like; and in such a case, notice of a trust would not prevent the subsequent performance or effect of this condition.

It was suggested that the transfer could not be completed without a breach of trust; but that is not so. After the notice, Smith did not require Hills to commit any breach of trust, or to do anything. It is the case of a person advancing money on an equitable security without notice of a trust, and afterwards getting in the legal estate, and no more involves a breach of trust than when a mere incumbrancer gets in the legal estate as *tabula in naufragio*. * * * There was nothing unreasonable in allowing the mortgagor to hold until it became necessary to enforce the power of taking actual possession.

The plaintiff is of course entitled to redeem, and there will be the usual decree for account and redemption.

LEVI MOORE v. METROPOLITAN NATIONAL BANK.

(Court of Appeals of New York, 1873. 55 N. Y. 41, 14 Am. Rep. 173.)

Appeal from judgment of the General Term of the Supreme Court in the third judicial department, affirming a judgment in favor of defendant, the Metropolitan Bank, entered upon an order dismissing the complaint as to it, upon trial of issues of fact settled herein to be tried by a jury.

This action was brought to restrain defendants from disposing of and to recover possession of a certificate of indebtedness of the State of New York for \$10,000, issued by the new capitol commissioners under chapter 830 of the Laws of 1868. Issues were settled and directed to be tried by a jury.

It appeared, upon the trial that the certificate in question was delivered by plaintiff to defendant Miller with an assignment thereon, as follows:

"\$10,000.

"For value received, I hereby transfer, assign and set over to Isaac Miller the within described amount, say ten thousand dollars.

"Levi Moore."

This assignment and delivery was induced by false representations upon the part of Miller as to his responsibility. Miller applied to plaintiff for a loan of \$7,000 and relying upon such representations the latter delivered to him the certificate so assigned, receiving therefor two notes amounting to \$7,000 and Miller's check for \$3,000, and under the agreement that Miller should get the certificate cashed in New York, paying the \$3,000 out of the proceeds. In case it was not cashed in three weeks, the certificate was to be returned and the check and notes taken up. The certificate was not cashed in the three weeks. Upon the trial before the jury, plaintiff introduced in evidence the certificate with said assignment thereon, and also a similar assignment from Miller to defendant, the Metropolitan National Bank, dated November 22, 1868. At the close of the evidence the counsel for the bank moved for a dismissal of the complaint as to it upon the ground, among others, that upon the plaintiff's proofs the bank was, *prima facie* a bona fide purchaser for value of the certificates from Miller, and so was entitled to hold the certificate; which motion was granted and plaintiff excepted.

GROVER, J.¹ The judge erred in ordering a dismissal of the complaint against the bank. * * * But a reversal of the judgment in favor of the bank upon this ground merely, will leave the real and only question litigated between the plaintiff and the bank undisposed of. This should be avoided, if it is presented by the case in a manner enabling the court to determine it. That question is, whether the bank, having in good faith taken a transfer of the certificate from Miller as security for his note, given to it at the time for money then loaned by the bank to him, acquired a title to the certificate, valid as against the plaintiff, as security for the money so loaned. It is clear that it acquired nothing more, as against the plaintiff or Miller. * * * The case shows that the plaintiff executed an absolute transfer of the certificate written thereon to Miller, and delivered the same to him. It further shows that Miller, in making the purchase, practiced such a fraud upon the plaintiff as would authorize

¹ Part of the opinion is omitted.

him to rescind the contract, as to him, and that he did, upon the discovery of such fraud, elect to rescind the same. The question is thus presented whether a bona fide purchaser of a chose in action, not negotiable, from one to whom the owner has transferred the apparent absolute ownership, upon the faith of such ownership obtains a valid title as against such owner, although his vendor had not such title. The counsel for the plaintiff insists that this precise question was decided against the title acquired by such purchaser, by this court, in *Bush v. Lathrop* (22 N. Y. 535), where it was held that equities existing between the assignor and assignee of a chose in action, not negotiable, attend the title transferred to a subsequent assignee for value, without notice,—that the latter takes the exact position of his vendor. The counsel for the bank, to sustain its title, cites *McNeil v. Tenth National Bank* (46 N. Y. 325, 7 Am. Rep. 341). In this it was held that, where the owner of corporate stocks conferred upon another an apparent title to or power of disposition over it, he is estopped from asserting his title as against an innocent third party who has acquired title in good faith from such apparent owner. It is obvious that both these cases cannot be upheld, unless there shall be found to be a distinction between the acquisition of title to stocks in a corporation and choses in action not negotiable.

* * * Why should the owner of a horse or of bank shares, who has given to another an absolute written transfer of all his right thereto for some purpose other than that of passing the title, be precluded, as against a bona fide purchaser from such person, from asserting his title, while, under the same state of facts he may reclaim from such purchaser a bond and mortgage or a certificate of indebtedness like the one in question? As to the former he is estopped, while as to the latter the same state of facts, it is insisted, will work no such result. The counsel for the plaintiff insists that such distinction should be made, for the reason that the purchaser of corporate shares and chattels from the apparent owner obtains a legal title which is valid and may be asserted in a court of law, while the assignee of a chose in action, not negotiable at common law obtained an equitable title only; and that the equity of the former owner, being prior in time to that acquired by the purchaser, is superior thereto, the rule in equity being that, where the equities are equal, the first in time shall prevail; but upon what ground the same state of facts that will estop a party from the assertion of a legal title will not also estop him from the assertion of an equitable one the counsel fails to show, for the very good reason that no such ground exists. It is so obvious that the estoppel should, upon principle apply to the latter equally with the former, that a distinction can only be justified upon authority. * * * It follows that the bank, if it made the loan in good faith to Miller, upon the credit of the certificate, acquired a title thereto valid against the plaintiff to the extent of the loan. From

the papers it appears that the certificate, at the time, amounted to something more than the loan to Miller by the bank. This excess belongs to the plaintiff. * * *

The judgment in favor of the bank must be reversed and new trial ordered, costs of the appeal to abide the final judgment for costs in the cause.²

CARRITT v. REAL & PERSONAL ADVANCE COMPANY.

(High Court of Justice, Chancery Division, 1889. L. R. 42 Ch. Div. 263.)

By an indenture of lease, dated the 23d of January, 1880, and made between Batty, of the first part and Scoley of the other part, a certain messuage and premises were demised to Scoley for the term of ninety-seven and one-half years, from the 25th December, 1879, at the rent and subject to the covenants and conditions therein contained.

By an indenture of mortgage dated the 23d of August, 1880, and made between Scoley of the first part and Carter of the other part, the said messuage and house were demised to Carter for the residue of the term (except the last day thereof) subject to a provision for redemption on payment by Scoley to Carter of the principal sum of £500. and interest as therein mentioned.

On the 2d of April, 1881, Scoley executed a further charge on the premises in favor of Carter for securing a further advance of £50.

By an indenture dated the 24th of February, 1886, and made between Scoley of the first part and Chuck of the other part, after reciting the above mentioned lease, mortgage and further charge, and that the principal sums thereby secured were still owing, but that all interest had been paid, and that Scoley had agreed with Chuck for the sale to him of the said premises, subject to the mortgage and further charge and the principal moneys and interest thereby secured, at the price of £134., it was witnessed that in pursuance of the assignment and in consideration of the sum of £184. paid by Chuck to Scoley (the receipt of which sum Scoley thereby acknowledged), Scoley

² The assignment from plaintiff to Moore did not pass the legal title to the certificate of indebtedness; at most it gave him a power of attorney which at the common law would have authorized him to sue in a court of law in the assignor's name to collect the obligation. What was the effect of Moore's assignment to the bank? It did not pass the legal title because Moore did not have the legal title to pass. It was not, it is submitted, the creation of a new power of attorney, nor was it an assignment of the existing power of attorney held by Moore. It was, if anything, the substitution of the bank as attorney in the old power of attorney in Moore's place. If this be true, the question arises whether Moore had by virtue of his power of attorney the implied right to substitute the bank as attorney in his own place. If he had, could the bank by virtue of the fact that it paid Moore a valuable consideration for the substitution and had no notice of the fraud by which Moore had secured the power of attorney stand in a better position than Moore and have the right as against the plaintiff to collect the debt and repay itself its advance in full? See 1 Harvard Law Review, 7, 8.

as beneficial owner conveyed the premises to Chuck, to hold the same to Chuck for the residue of the term of years created by the above lease, at the rent and subject to the covenants by and in the lease reserved and contained, and to the said mortgage and further charge, and the £550. and interest thereby secured. And the indenture contained a covenant by Chuck to pay the rent reserved by the lease of the 23d of January, 1880, and observe and perform the covenants and conditions therein contained and keep Scoley indemnified against all claims and demands on account thereof.

The assignment of Scoley to Chuck was made to him solely as trustee for Frederick Carritt and the plaintiff, who were then in partnership as solicitors, and who paid the whole of the consideration which was paid to Scoley in respect of such assignment. It was the fact, however, that no money passed, but Messrs. Carritt having a claim against Scoley, it had been arranged that Scoley should convey the equity of redemption in the property in consideration of the release of that claim.

By an agreement dated the 29th of April, 1886, and made between Chuck of the first part and Frederick Carritt and the plaintiff of the other part, Chuck agreed that he would assign or dispose of the premises as Frederick Carritt and the plaintiff should from time to time direct, and that in the meantime the premises subject to the said incumbrances, should be held by Chuck in trust only for Frederick Carritt and plaintiff.

In the month of March, 1887, Chuck applied to the defendants for a loan of £50. upon the security of the equity of redemption in the above premises, and represented to them that he was the owner of the house, subject to a mortgage of £550. The defendants, relying upon his representations and the fact of the assignment of the 24th of February, 1886, being in his possession, advanced him the sum of £50., which was secured to them by an equitable charge by demise of the equity of redemption in the premises for the whole term less one day, dated the 30th of March, 1887, and by a promissory note. At the time of the execution of the mortgage Chuck deposited with the defendants the assignment of the 24th of February, 1886. He afterwards absconded.

The plaintiff by his statement of claim alleged that he and Frederick Carritt retained the assignment of the 24th of February, 1886, till the same was wrongfully and feloniously abstracted from their custody by Chuck, and that the abstraction was not discovered by the plaintiff and his partner, or either of them, till after Chuck had delivered the assignment to the defendants; that in April, 1887, Frederick Carritt retired from the partnership, and thereupon all his interest in the premises vested in the plaintiff, who continued to act as Carter's solicitor; and further, that Chuck entered into the transaction with the defendants fraudulently, and in breach of trust, and that the defendants took no assignment of the premises, nor any written

document conveying to them any interest therein, and neglected to make proper inquiries, or investigate the title before making the advance. It appeared, however, that the defendants besides their equitable charge took a statutory declaration from Chuck that he had not charged or surrendered his interest in the property.

The plaintiff claimed a declaration that the defendants had no interest or claim on the premises, and delivery up of all documents relating thereto.

Witnesses were examined on both sides, but the evidence went chiefly to the question of negligence as to the custody of the deed of the 24th of February, 1886.

CHITTY, J. The question is one of priority arising between the plaintiff and the defendants, each of whom has only an equitable title so far as any question falls to be decided by me. The plaintiff alleges and rightly, that he is first in point of time. The defendants, who come second, say that in the circumstances of the case priority ought to be ascribed to them.

The property dealt with is leasehold, demised for an ordinary building term; and the legal estate is outstanding in a mortgagee, that mortgage having been created by a demise for the residue of the original term except the last day. Subject to that demise, the original term remains vested in Chuck.

The plaintiff's title stands thus: Messrs. Carritt (a firm of solicitors, of whom the plaintiff Mr. Carritt, is now the representative, the partnership having been dissolved) had a claim against Scoley, and it was arranged that Scoley should convey the equity of redemption in the property that I have mentioned in consideration of the release of that claim. It was considered "not convenient" by Messrs. Carritt to take the deed in their own name; but having a confidential clerk named Chuck, they proposed to take the deed in his name as trustee for them. The transaction assumed the form (and there is nothing in the evidence to show that the form does not correctly represent the true transaction) of a sale of the equity of redemption at the price of the amount of the claim. The deed of assignment, which is in the common form, is an assignment by Scoley to Chuck. Some little time after, Chuck executed a deed of trust in favor of Messrs. Carritt, the trust not appearing in any way on the face of the assignment. Subsequently Chuck, being in possession of the deed of assignment, went to the defendants and borrowed money from them, giving them an equitable charge by the demise for the original term less the last day. He acted ostensibly (but fraudulently) as if he were the owner of the property, subject only to the mortgage. The defendants did not investigate the title. If they had investigated the title, and Chuck had acted honestly, there would have appeared on the abstract the declaration that Chuck had executed in favor of Messrs. Carritt. Chuck made a statutory declaration, in which he stated that he had not charged or incumbered "his interest"

in the equity of redemption. Except by not having investigated the title, it is clear that the defendants took all reasonable precautions. They were satisfied that Chuck was a respectable man, and they did not inquire of those in whose employment he was, Messrs. Carritt, nor were they bound to do so. Chuck was introduced to them by a person they knew; they had no reason to suspect Chuck's honesty; and they accordingly advanced him the money, making the loan he asked for, and took from him a deed which created only an equitable interest in them, and at the same time took from him the deed of assignment which had been executed by Scoley.

Now there was evidence in regard to the custody of the assignment itself; the result is, in my opinion that Messrs. Carritt did not establish that the deed of assignment was ever placed in either one of their safes. The plaintiff said, and said truly, that it was the duty of Chuck to put the deed of assignment, as well as the deed of trust, in one of their safes; but Mr. Carritt, who gave his evidence very fairly, was unable to show that the deeds or either of them, had ever been in their custody in that sense. I must take it as a fact that they allowed Chuck, in whom they had the greatest confidence, to remain in possession of the deed and they took no precaution with reference to the declaration of trust, although their not keeping the deed of trust away from the hands of Chuck is an immaterial fact in the case. The point made for the defendant is that the plaintiff allowed Chuck to have possession of the deed of assignment.

Now the case, therefore, as between the plaintiff and the defendants, is this: the defendants claim through a trustee for the plaintiff. The law allows a man for convenience, being the absolute owner, to take a conveyance of land, or a transfer of stock, or an assignment of a lease, or indeed any other property, instead of to himself, to a trustee to hold for him; and though it may not be prudent to allow the indicia of title, the title-deed, the stock certificate, or the like, to remain with the trustee, yet it is clear law that the deeds, or certificates of title, or other the indicia of title, are lawfully and rightfully in the custody of the trustee. I say it is not altogether prudent for the equitable owner to leave the deed in the hands of his trustee because in many cases the trustee has the legal title also; and taking the case, for instance, of stock, he can make a perfect assignment of stock to a purchaser for value, who takes it without any notice, and thereby obtains a good title against the equitable owner, for whom the transferor held the stock merely as trustee. But the cestui que trust, the absolute equitable owner, has at least some safeguard in a case of that kind if he keeps the certificate in his own possession, because the trustee then has a greater difficulty in procuring the transfer to be registered in the books of the company. Still I go back to the proposition that there is no negligence on the part of a cestui que trust in allowing all the instruments of title to remain in the custody of the trustee.

Then I come to the law of the case, and it appears to me that this case is covered by the decision of the House of Lords in the case of *Shropshire Union Railways and Canal Company v. Reg.* [L. R. 7 H. L. 496]. After having carefully read the speeches delivered to the House on that occasion, I take this proposition from Lord Cairns' address, which appears to give the ground upon which the House of Lords decided. He says [page 510]: "The present appears to me to be simply the case of an ordinary trustee holding property of the kind in question for a cestui que trust and an incumbrancer created by the trustee, which can only carry to that fresh incumbrancer such interest as the trustee could give. The trustee could not give an interest as against the cestui que trust, and, therefore it appears to me that the incumbrancer now represented by the plaintiff in the mandamus, is not entitled to have the transfer in the company's books of the stock in question." In his address Lord Cairns deals with the proposition, upon which I have heard considerable argument at the bar, whereby it was sought to establish a difference between the case of a trustee holding for a married woman, child or the like, and the case where, for the mere purpose of convenience, the absolute owner procures a person to act, and simply creates the trust for the purpose of his own convenience; and that distinction, Lord Cairns holds, cannot be maintained. He had the case before him of the absolute owners having put the stock in the name of a trustee. It is true that in that case Lord Cairns says, on the facts, that the persons who had created the trust, being a corporation, could not hold in their own name; but when his address is considered from beginning to end, it will be seen that no distinction on that ground can be relied on. The result is, so far as I have gone, that the fraudulent act of Chuck does not displace the equitable title of the plaintiff.

Judgment for plaintiff.¹

BURCHARD v. HUBBARD and Others.

(Supreme Court of Ohio, 1842. 11 Ohio, 316.)

This was a bill in chancery from the County of Sandusky.

In November, 1822, a patent issued to Elizabeth Whitaker for twelve hundred and eighty acres of land, being the "Whitaker reserve," in Sandusky County. June 3, 1823, Elizabeth Whitaker conveyed it to George F. Whitaker in fee. October 10, 1823, George F. conveyed in fee 190 acres, including the land in controversy, to Isaac Whitaker. October 12, 1823, Isaac mortgaged the 190 acres to James Whitaker to secure the payment August 12, 1832, of \$400 with interest annually.

¹ *Cave v. Cave*, L. R. 15 Ch. Div. 639 (1880) acc. *Contra Penny v. Watts*, 2 De G. & Sm. 501, 521 (1848); *Lane v. Jackson*, 20 Beav. 535 (1855).

Part of this 190 acres was sold at a tax sale in December, 1831, to R. Dickinson, who received a tax deed. Shortly after Dickinson agreed to hold the land for Isaac's benefit and to reconvey to him upon reimbursement of the amount paid and disbursements. Dickinson transferred to George F. this tax title by deed dated January 15, 1834, to be held upon the same terms as it had been by Dickinson.

In March, 1835, Burchard agreed to purchase this tract of 190 acres from George F. Whitaker for \$800, with Dickinson's assent, but upon condition that the sale should be approved by James and Isaac. It was approved of with the understanding that \$200 should be invested in wild lands for Isaac's benefit. Dickinson, being a lawyer, was consulted as to the best mode of transmitting the title. He advised that, instead of conveying directly to the complainant Burchard, Isaac should make a deed to George F. in whom it was supposed the tax title was already vested, and that George F. Whitaker should then convey to Burchard, who would thus derive a perfect and unencumbered title.

April 12, 1835, a deed to George F. was made by Isaac, and left in Dickinson's hands, by whom it was retained until July, 1835, when it, together with a release of the mortgage by Isaac, was delivered to Burchard, and they were by him recorded August 14th. On November 3, 1835, George F. Whitaker executed a deed in fee for the land to complainant.

But, in the meantime, George F. Whitaker, July 15, 1834, had sold this same tract of land for \$700 to defendant Hubbard, to whom in June, 1835, he made a deed in fee for 150 acres of the west part of the 190 acres. This deed was recorded June 26, 1835. In 1838, Hubbard sold and conveyed to Brooks. Neither Hubbard nor Brooks had any actual notice of the transactions of George F. Whitaker with the complainant, but they were informed and believed that George F. had a perfect title. The complainant had no notice of the transaction between George F. and Hubbard.

The bill is filed by Burchard, setting forth his title, and praying to be quieted therein. The defendants, Hubbard and Brooks, answer denying all notice of Burchard's interest, and claim that they are bona fide purchasers, and have an equity prior to the complainant's, for which they claim protection.

BIRCHARD, J. The first question in this case grows out of a tax sale, and the decision of it will settle the merits of this controversy. [The tax title was held invalid.]

Whether the subsequent passing of the legal title, through George F. Whitaker, will inure to the benefit of Hubbard, by reason of the covenants contained in Whitaker's deed, is the material and remaining question in the case. It will be observed, that a mere naked legal title was all that ever passed through him. Burchard was the purchaser, and the title was conveyed to George F. Whitaker, as a mat-

ter of convenience. Taking the title, then, as between the two, the law constituted George F. a mere trustee of the naked legal title. A trust resulted to Burchard, whose money was paid to the bona fide owner. Had George F. Whitaker acquired for himself the legal and equitable title, he would, by reason of the warranty contained in his deed, have been estopped at law from denying the title to Hubbard; and, in chancery his conveyance to Hubbard would have been binding on his conscience.

We are asked to extend and apply this rule, as against the complainant. To do so, in the state of facts here existing, would be pushing it beyond reason. The equity of the complainant is equal to that of the respondents. He had no notice of their rights; his purchase did the respondents no harm; it did not mislead them. The deed, in fact, was not delivered to George F. Whitaker, but went into the hands of Dickinson, the agent and attorney of the complainant, who received it, and delivered it to the complainant, by whom it was put on record. If the doctrine of estoppel could apply, it would vest no better title in Hubbard than George F. Whitaker himself acquired; that is, a trust estate.

In equity, he who is prior in time, other things being equal, hath the better right. Tried by this rule, complainant has the better equity in the lands. He purchased of the rightful owner, and paid his money. Hubbard bought of a stranger to the title. His payments were completed on the 24th of June, 1835, at which time he took his deed, from a stranger who had nothing but a void tax title. This created no equity to the lands then owned by Isaac Whitaker. Before this time, complainant had become interested in the land by purchase, and payment of the money to Isaac, the real owner.

True, the deed from Isaac to George F. Whitaker, bears date the 12th day of April, 1835, but it was not delivered until the August following. The acknowledgment bears date the 10th of August, and Hubbard in his answer, says he had no knowledge of it. Hubbard's equity in the land, if he have any, can only date from the time George F. Whitaker received a legal title. It commenced with the delivery of Isaac's deed to George F. Whitaker; not with the delivery of George's deed to Hubbard. Before this, Burchard had acquired an equity which chancery would have enforced as against Isaac, the real owner. And it would be strange, if Isaac's subsequent deed, given without consideration on the part of George F., could, by operation of law, vest a title that would defeat him.

Is it doubted, if George F. had refused to convey, under these circumstances, that equity would have compelled him? He having made such conveyance, it must be held operative, and Burchard's equity being prior in time, his title should be quieted.

MOORE v. JERVIS.

(In Chancery, before Vice Chancellor Sir Lancelot Shadwell, 1845. 2 Collyer, 60.)

THE VICE CHANCELLOR. Charles Timmis placed in the hands of the defendant, Mr. Jervis, by way of loan, at interest, a sum of £800. and upwards, and took his promissory note for it, payable to Charles Timmis only, not to Charles Timmis or his order. This sum, for I think the evidence of identity quite sufficient, was trust money, which Timmis held as trustee for the benefit of other persons, but so that, as to a certain proportion, Timmis had himself a beneficial interest. The trust was known at the time to Mr. Jervis, but did not appear on the face of the note—which gave no notice that the payee was not the only person interested in the money, though, perhaps, the circumstance, that he could not negotiate it, so as to confer on an indorsee a right to bring an action upon it against Mr. Jervis in the indorsee's own name, may be thought of a nature to give rise to inquiry. Each must be taken to have been aware, that this investment was, as it was, a plainly irregular one, and a plain breach of trust, not less so, by reason that the borrower was a gentleman of fortune and respectability.

Timmis, being thus the holder of the note, indorses it, and deposits it with the plaintiff, a banker, as a security for money lent, and to be lent, to him by the plaintiff. This of course was a breach of trust, but it does not appear that the plaintiff had any notice of the title to the note, save such as *ex facie* it afforded. The plaintiff, however, acquired only an equitable title, and therefore no better title to the note, or the money secured by it, than Timmis could rightfully confer, and, consequently no title as against those for whom he was a trustee.¹

PINKETT v. WRIGHT.

(In Chancery, before Vice Chancellor Sir James Wigram, 1842. 2 Hare, 120.)

By a settlement, dated the 3d of April, 1828, Francis Johnson vested certain foreign stocks in John Wright and Henry Robinson, upon trusts, under which, the plaintiffs, and some of the defendants, were beneficially interested. These stocks were later converted into £21,000. consols. Subsequently consols amounting to £5,000, were sold and the proceeds invested in 160 shares, of £100. each, of the capital of the Provincial Bank of Ireland. On July 9, 1830, Johnson, Wright and Robinson executed a declaration of trust, indorsed

¹ The English rule prevails in several jurisdictions in the United States, especially in New York, where the decisions of Chancellor Kent, *contra*, have been overruled.

on the settlement, declaring that Wright, as to said 160 shares was a trustee upon the trusts of the settlement. Johnson died in 1833, and the defendant Reynolds was his executor. From October, 1837, until his bankruptcy, Wright had 225 shares of the stock of the Provincial Bank of Ireland standing in his name. The Provincial Bank had allotted a number of additional shares of £10. each, by way of bonus, to the original shares; but no question arose as to them, it being admitted that they would follow the original shares.

January 1, 1840, Wright, being indebted to the Provincial Bank, agreed to assign 100 shares of the 225 shares to the bank as security by letter reading as follows:

"To the Directors of the Provincial Bank of Ireland—Gentlemen: As security for the sum of £4,000. held by me on loan from the bank, I hereby oblige myself to transfer unto the name of any one of your number, whenever you shall desire it, 100 shares of £100. each, of the stock of the Provincial Bank of Ireland now standing in my name.
John Wright."

November 23, 1840, Wright and his partners, bankers in London, stopped payment. November 24, 1840, plaintiff's solicitor notified the bank of the claim of the parties interested under the settlement of April 3, 1828, to the said 100 shares. December 17, 1840, a fiat in bankruptcy issued against Wright and assignees were appointed.

The bill was filed by the plaintiffs interested under the settlement against the trustees, the Provincial Bank (by R. Murray, their public officer), the assignees in bankruptcy and others praying the appointment of new trustees of the settlement, that the said 160 shares and 32 additional shares, standing in Wright's name, might be transferred to such new trustees; and that, if necessary, the interests of the other defendants in the shares standing in Wright's name, might be ascertained and declared.

VICE CHANCELLOR.¹ * * * Secondly, I shall consider the claims of the plaintiffs and the bank. * * * The next point I propose to consider is, that which was rested upon the relation in which it was said that Wright and the bank stood towards each other as partners. * * *

I conclude, for the reasons I have stated, that the bank is not entitled to a priority over the plaintiffs, in respect of any general rule of law arising out of the partnership contract between the bank and Wright. I conclude, in effect, that in respect of all dealings between the bank and a proprietor, for or in respect of his shares, the bank must be considered as a stranger, dealing in like manner, would be. The bank must establish its right to, or lien upon, the shares of a proprietor, by special contract, as a stranger would be compellable to do.

¹ Part of the opinion is omitted.

The question then is, whether the bank has established a priority over the plaintiffs, by the specific contract between Wright and the bank of the 1st of January, 1840.

That the bank has established an interest in Wright's shares, as against Wright and his assignees, admits of no doubt. * * * The claim of priority over the plaintiffs, however, depends upon other considerations. The claim was rested upon the suggestion, that the bank had the legal interest in, or control over, Wright's shares, both as holders of the capital in the concern, and by the power the bank has to refuse to permit a transfer of the shares; and it was said, that the equities between the plaintiffs and the bank were the same, and that a Court of Equity would allow the bank to retain any advantage which its position gave it. My answer to this argument will be found in the observations I have already made. From October, 1837, to the 1st of January, 1840, Wright was a trustee for the plaintiffs of 160, part of 225 shares, standing in his name. I have already stated the grounds upon which I consider the shares comprised within the trusts of the settlement of 1828 to be identified with those comprehended in the 225 that stood in Wright's name on the 1st of January, 1840. When Wright, therefore, on that day, agreed to pledge 100 shares to the bank as security for his private debt, he agreed, to the extent of 35 of those shares, to pledge shares of which he was a trustee for the plaintiffs. This he could not be either compelled by the bank, or permitted by this Court, to do, unless the bank (considered as a stranger advancing money upon the 100 shares it claims) could establish a better equity than that of the plaintiffs, to call for a transfer of the 35 shares in dispute. For the reasons I have already stated, I cannot consider the bank as standing in a better situation than a stranger would stand, in respect of any contract with a proprietor for the transfer of his shares. Now, I can discover no satisfactory ground upon which, as between the plaintiffs and the bank, I can deprive the former of that priority which time and dates *prima facie* give them. The persons to whom the security is given by Wright, on behalf of the company, are the directors of the company. Wright, who is the author of the wrong of which the plaintiffs complain, by a letter addressed to the directors of the company, of whom he is one, engages that property, of which he is trustee, shall be transferred to himself and his co-directors; and that, for purposes in which he is beneficially interested. I think that the position of the parties (no transfer having been made) is sufficient to leave the plaintiffs in possession of the original priority which time alone would give them.

In coming to the conclusion which I have stated, I do not rely upon the doctrine of constructive notice arising from Wright's position, either as a partner, or a director. The directors who took the

security from Wright are purchasers of trust property; one of whom knew that it was trust property. Admitting, for the purposes of the argument, but not farther, that the plaintiffs had not perfected their equitable title by notice to the bank (if I can consider the bank as unaffected by notice), I think, under such circumstances, the claims of the plaintiffs cannot be postponed to that of the bank. But I by no means admit that any such notice to the bank was necessary to perfect the plaintiffs' equity, as against a subsequent equitable incumbrancer. On the contrary, having come to the conclusion that the bank has not any lien upon Wright's shares, resulting from their partnership relation, I think the plaintiffs' equitable title was perfected by the deed of trust executed by the trustees of the settlement in July, 1830, without notice to the bank or any other person. The trust in favor of the plaintiffs was perfected; and the bank is in the situation of a person taking a subsequent equitable incumbrance on the property.²

ELDRIDGE and Another v. TURNER, by His Next Friend, etc.

(Supreme Court of Alabama, 1847. 11 Ala. 1049.)

The defendant in error filed his bill against John M. Eldridge, Henry B. Turner and James W. Camp. Camp sold his interest in a stallion to Henry B. Turner, who in consideration therefor made a note promising to pay said Camp for the use of the defendant in error \$500. Subsequently Camp endorsed this note to Eldridge who sued the maker and obtained judgment. The bill prayed an injunction to restrain the collection of all the judgment but the costs; that the defendant therein be a trustee for the complainant in respect to the amount due and to become due on the judgment; and that such other relief as might be proper be granted. An injunction was granted accordingly.

Pending the suit Camp died, but the suit was not revived against his representatives.

The Chancellor was of opinion that Camp became a trustee for the complainant, as soon as the note was made and delivered to him; that the difficulty of collecting the money from Camp or Eldridge, if the latter should collect the money on his judgment, was sufficient to vest the Court of Chancery with jurisdiction. Therefore it was considered that the bill not being revived against the representatives of Camp abate as to him; and it was ordered and adjudged that the injunction be perpetuated.

COLLIER, C. J.³ We cannot think that the bill in this case is wanting in equity. The inducement of the maker of the note, it is al-

² Affirmed by House of Lords, 12 Cl. & F. 764 (1846).

³ Part of the opinion is omitted.

leged, was not only to obtain the payee's interest in the horse which they held as joint property, but to lend his aid in promoting the bounty in favor of his son. * * * Conceding that Camp's interest in the horse was worth \$500, or even more, yet if he sold it under a stipulation with the purchaser that he would take his note for that amount, agreeing upon its face that the money should be paid for the benefit of an infant son of the vendee, the vendor, by the acceptance of the note, and delivery of the horse, became a trustee for the son. * * * If, under such circumstances, the vendor could exempt himself from the performance of the trust, then he might successfully practice a fraud on the maker of the note, who but for the destination the money was to receive, never would have entered into the contract.

The indorsement of the note by the payee to Eldridge, though for a full consideration, cannot affect the rights of the beneficiary. Upon its face it purports to be an undertaking to pay for the use of the complainant (*Turner v. Eldridge*, 6 Ala. 821), and of course informed the endorsee what was the character of the security he received.

Assuming the case made by the bill to be true and the indorsement of the note was a breach of trust on the part of Camp, which authorized the cestui que trust to come in equity and assert his right to the money. To make that right effectual and as expeditious as might be, it was allowable to pray an injunction to restrain the indorsee in the enforcement of the judgment.

The object of the bill in this case is, to secure a trust fund in the hands of the defendant, Turner, and as secondary and ancillary to this object, a judgment against the holder of the fund is sought to be enjoined.

[The Court held that the cause should not have been heard without bringing in the personal representatives of Camp and reversed the decree and remanded the cause that the defect of parties might be remedied.]

SPAULDING, Receiver, v. KENDRICK and Another.

(Supreme Judicial Court of Massachusetts, 1898. 172 Mass. 71, 51 N. E. 453.)

Bill in equity, by the receiver of the Stockbridge Savings Bank, to recover the sum of five thousand dollars, the property of the bank, alleged to have been misappropriated by Frederick A. Hobbs, a former receiver of the bank, who had been removed from his office. Trial in the Superior Court, before Lilly, J., who found for the defendant Kendrick, who alone defended and the plaintiff alleged exceptions. The facts appear in the opinion.

KNOWLTON, J.¹ The bill alleges that the sum of \$5000 was taken by Hobbs from the funds in his hands as receiver, and sent to Wil-

¹ Part of the opinion is omitted.

liam A. Dickinson of Amherst in the form of a draft, and by him delivered to one James I. Cooper, who received it as the attorney of the defendant Kendrick, and turned it over to him. The plaintiff discontinued his suit as against all the defendants except Kendrick and Hobbs, and Kendrick alone defends. Kendrick and one Stockbridge were sureties for Hobbs upon a bond given by him as trustee under the will of one Dickinson, in the sum of \$8000, and previously to the receipt of the money Kendrick had filed a petition in the Probate Court asking to be relieved from further liability on the bond.

We may assume upon the evidence that the money belonged to the bank, and was misappropriated by Hobbs. There was evidence to warrant the finding of the judge, that the defendant Kendrick had no knowledge that the money was other than the property of Hobbs, and that he received it through his attorney in good faith, and as security for a liability of a greater amount than \$5000 and on account thereof forbore to prosecute his petition for relief as surety on the bond of Hobbs. The evidence warranted a finding that this receipt of it was the same in legal effect as if it had been put into his possession by Hobbs with his own hand, to be held as security against loss as surety on the bond. The evidence tended to show that the draft was sent to Mr. Dickinson to be held and used as such security, and that, if the delivery of it to Mr. Cooper was not expressly authorized by Hobbs, it was within the general purpose of Hobbs, and was soon afterwards known to him and ratified by him.

The law of the case is settled by numerous decisions. If a thief gives stolen money, or negotiable securities before their maturity, in payment of his debt, or as security for it, to one who in good faith receives the money or securities as belonging to him, the creditor can hold the property as against the true owner. As between the payor and payee there is no mistake which affects the validity of the transaction. One receiving money or other negotiable securities in payment of or as security for an existing debt is not bound to inquire where the money or securities were obtained. It is better that money or a negotiable security, passing from hand to hand to one who rightly receives it for a valuable consideration, should carry on its face its own credentials. * * * It has often been decided in this Commonwealth that a pre-existing debt is a valuable consideration for a payment made or a security given on account of it. * * *

Exceptions overruled.

II. BY ACT OF THE CESTUI QUE TRUST.

FRANCIS NORTH v. CHAMPERNOON and Others.

(In Chancery, before Lord Chancellor Nottingham, 1681. 2 Chancery Cases, 78.)

Sir Francis North purchased lands in Essex; the fee of some part of the lands were in trustees but the trust was, after debts paid, to Richard Allington in tail with other remainders over. Richard Allington the cestui que trust in tail suffered a common recovery with double voucher to bar the remainders over limited by way of trust, but no legal tenant to the præcipe, for the freehold was in the trustees who were no parties to the recovery. And the great question was whether the recovery did bar the remainders in trust, for the plaintiff's title was under that recovery.

The decree is in these words: His Lordship upon long debate of the matter, on hearing what was alleged by counsel on either side touching the same, declared, that he was fully satisfied that the said recovery did sufficiently bar all remainders depending upon the estate tail of Richard Allington, who suffered the same, it being a general rule, that any legal conveyance or assurance by a cestui que trust shall have the same effect and operation upon the trust, as it should have had upon the estate in law in case the trustees had executed their trust.

DEARLE v. HALL.

(In Chancery, before Lord Chancellor Lyndhurst, 1827. 3 Russell, 1.)

THE LORD CHANCELLOR. The cases of Dearle v. Hall and Loveridge v. Cooper were decided by Sir Thomas Plumer; and from his decree there is in each of them an appeal, which stands for judgment. As the two cases depend upon the same principle, though the facts are, to a certain degree, different, the better course will be to dispose of both together; and as Dearle v. Hall was the first of the two which came before the court below, though it was not argued on appeal till after Loveridge v. Cooper had been heard, I shall first direct my attention to the facts on which it depends.

Zachariah Brown was entitled, during his life, to about £93. a year, being the interest arising from a share of the residue of his father's estate, which, in pursuance of the directions in his father's will, had been converted into money, and invested in the names of the executors and trustees. Among those executors and trustees was a solicitor by the name of Unthank, who took the principal share in the management of the trust. Zachariah Brown, being in distress for money,

in consideration of the sum of £204., granted to Dearle, one of the plaintiffs in the suit, an annuity of £37. a year, secured by a deed of covenant and a warrant of attorney of the grantor and a surety; and, by way of collateral security, Brown assigned to Dearle all his interest in the yearly sum of £93.; but neither Dearle nor Brown gave any notice of this assignment to the trustees under the father's will.

Shortly afterwards, a similar transaction took place between Brown and the other plaintiff, Sherring, to whom an annuity of £27. a year was granted. The securities were of a similar description; and, on this occasion, as on the former, no notice was given to the trustees.

These transactions took place in 1808 and 1809. The annuities were regularly paid till June, 1811; and then, for the first time, default was made in payment.

Notwithstanding this circumstance, Brown in 1812, publicly advertised for sale his interest in the property under his father's will. Hall, attracted by the advertisement, entered through his solicitor Mr. Patten, into a treaty of purchase; and it appears from the correspondence between Mr. Patten and Mr. Unthank that the former exercised due caution in the transaction, and made every proper inquiry concerning the nature of Brown's title, the extent of any incumbrances affecting the property, and all other circumstances of which it was fit that a purchaser should be apprised. No intimation was given to Hall of the existence of any previous assignment; and, his solicitor being satisfied, he advanced his money for the purchase of Brown's interest, and that interest was regularly assigned to him. Mr. Patten requested Unthank to join in the deed; but Mr. Unthank said, "I do not choose to join in the deed; and it is unnecessary for me to do so, because Z. Brown has an absolute right to this property, and may deal with it as he pleases." The first half-year's interest, subject to some deductions, which the trustees were entitled to make, was duly paid to Hall; and, shortly afterwards Hall for the first time ascertained that the property had been regularly assigned, in 1808 and 1809, to Dearle and to Sherring.

Sir Thomas Plumer was of opinion that the plaintiffs had no right to the assistance of a Court of equity to enforce their claim to the property as against the defendant Hall, and that, having neglected to give the trustees notice of their assignments, and having enabled Z. Brown to commit this fraud, they could not come into this court to avail themselves of the priority of their assignments in point of time, in order to defeat the right of a person who had acted as Hall had acted, and who, if the prior assignments were to prevail against him, would necessarily sustain a great loss. In that opinion I concur.

It was said that there was no authority for the decision of the Master of the Rolls,—no case in point to support it; and certainly it does not appear that the precise question has ever been determined,

or that it has been even brought before the court, except, perhaps, so far as it may have been discussed in a non-reported case of *Wright v. Lord Dorchester*. But the case is not new in principle. Where personal property is assigned, delivery is necessary to complete the transaction, not as between the vendor and vendee, but as to third persons, in order that they may not be deceived by apparent possession and ownership remaining in a person, who, in fact is not the owner. This doctrine is not confined to chattels in possession, but extends to choses in action, bonds, etc.; in *Ryall v. Rowles* [1 Ves. Sr. 348] it is expressly applied to bonds, simple contract debts, and other choses in action. It is true that *Ryall v. Rowles* was a case in bankruptcy; but the Lord Chancellor called to his assistance Lord Chief Justice Lee, Lord Chief Baron Parker, and Mr. Justice Burnett; so that the principle on which the court there acted must be considered as having received most authoritative sanction. These eminent individuals, and particularly the Lord Chief Baron and Mr. Justice Burnett, did not, in the view which they took of the question before them, confine themselves to the case of bankruptcy, but stated grounds of judgment which are of general application. Lord Chief Baron Parker says, that, on the assignment of a bond debt, the bond should be delivered, and notice given to the debtor; and he adds, that, with respect to simple contract debts, for which no securities are holden, such as book debts for instance, notice of the assignment should be given to the debtor, in order to take away from the debtor the right of making payment to the assignor, and to take away from the assignor the power and disposition over the thing assigned. 1 Ves. Sr. 367; 2 Atk. 177. In cases like the present, the act of giving the trustee notice is, in a certain degree taking possession of the fund; it is going as far toward equitable possession as it is possible to go; for, after notice given, the trustee of the fund becomes a trustee for the assignee who has given him notice. It is upon these grounds that I am disposed to come to the same conclusion with the late Master of the Rolls.

I have alluded to a case of *Wright v. Lord Dorchester*, which was cited as an authority in support of the opinion of the Master of the Rolls. In that case, a person of the name of Charles Sturt was entitled to the dividends of certain stock, which stood in the names of Lord Dorchester and another trustee. In 1793 Sturt applied to Messrs. Wright & Co., bankers at Norwich, for an advance of money, and, in consideration of the moneys which they advanced to him, granted to them two annuities, and assigned his interest in the stock as a security for the payment. No notice was given by Messrs. Wright & Co. to the trustees. It would appear that Sturt afterwards applied to one of the defendants, Brown, to purchase his life interest in the stock; Brown then made inquiry of the trustees, and they stated that they had no notice of any incumbrance on the fund: up-

on this B. completed the purchase, and received the dividends for upwards of six years. Messrs. Wright then filed a bill, and obtained an injunction, restraining the transfer of the fund or the payment of the dividends; but, on the answer of Brown, disclosing the facts with respect to his purchase, Lord Eldon dissolved that injunction. At the same time, however, that he dissolved the injunction, he dissolved it only on condition that Brown should give security to refund the money, if, after hearing, the Court should give judgment in favor of any of the other parties. That case was attended also with this particular circumstance, that the party who pledged the fund stated by his answer that, when he executed the security to Wright & Co., he considered that the pledge was meant to extend only to certain real estates. For these reasons I do not rely on the case of Wright v. Lord Dorchester as an authority; I rest on the general principle to which I have referred; and, on that principle, I am of opinion that the plaintiffs are not entitled to come into a Court of equity for relief against the defendant Hall. The decree must, therefore, be affirmed and the deposit paid to Hall.

The case of Loveridge v. Cooper [3 Russ. 30], though the circumstances are somewhat different, is the same in principle with *Dearle v. Hall* and must follow the same decision.¹

JONES v. JONES.

(In Chancery, before Vice Chancellor Sir Lancelot Shadwell, 1838. 8 Simons, 633.)

Thomas Jones by will dated May 25, 1815, devised his freeholds in trust to pay the rents thereof to Sarah Harvey for her life, and after her decease in trust for Mary Whitworth and Eliza Whitworth, their heirs and assigns. James Whitworth by will dated December 7, 1821, devised a freehold messuage in trust for Eliza Whitworth for life, with remainders over.

In 1822, Frederick Lewis Brown married Eliza Whitworth and by marriage articles Eliza Whitworth conveyed the remainder in fee expectant upon the death of Sarah Harvey in one-half of the premises devised by Thomas Jones to trustees to such uses, after the marriage,

¹ In the principal case the last purchaser before purchasing made inquiry of the trustee as to the existence of prior incumbrances and made his purchase after being assured there were none.

In *Foster v. Cockerell*, 9 Bligh's N. R. 332 (1835), the second purchaser purchased without inquiry but was given priority over a prior purchaser simply because he was the first to notify the trustee. In *Meux v. Bell*, 1 Hare, 73 (1841), at pages 86 and 87, will be found by Vice Chancellor Wigram the best statement of the reasons in support of this position.

In England an assignee in bankruptcy is in the same position as any other assignee. The English rule prevails in many states in this country, but there are several in which it does not hold. *Putnam v. Story*, 132 Mass. 205 (1882); *Williams v. Ingersoll*, 89 N. Y. 508, 523 (1882).

as Frederick Lewis Brown and Eliza should from time to time jointly appoint, with divers limitations over.

In November, 1825, Brown and wife borrowed £660. of Jane James and transferred her interest in all the devised estate as security. In 1826, they borrowed of John Jones £500. and transferred to him Mrs. Brown's interest in the same premises as security. Jones had no notice of the prior incumbrance and made before loaning the money inquiries of the trustees under the will of Thomas Jones and James Whitworth as to the existence of incumbrances. Later in 1826, they borrowed of John Harris £800. and transferred to him her interest in said premises as security. Before making the loan Harris made due inquiry for previous incumbrances and was informed of the incumbrance of Jane James, now vested by assignment in the defendants, Thomas Taylor Webb and David Jones, but not of the incumbrance of John Jones.

A reference to a Master to report incumbrances and state their priorities was had and he reported the priorities as follows: First the mortgage vested in Webb and David Jones; second the mortgage to John Harris and third the mortgage to John Jones and now vested in plaintiffs. To this report the plaintiffs excepted.

THE VICE CHANCELLOR, after stating the substance of the report, continued thus:¹

To this report an exception is taken by the parties who claim under John Jones, insisting on their priority over Harris; and the question is whether the report is right.

At law the rule clearly is that different conveyances of the same tenement, take effect according to their priority in time. If a man seized in fee, first grants one term of years and then another term, the second termor cannot enter till the first term has ceased by effluxion of time, surrender or otherwise. So, if freehold interests are carved out of the fee by different conveyances, the estate of the second grantee cannot take effect in possession, till the estate of the first has, in some measure, ceased. The effect of different conveyances is the same as if different successive estates were granted by the same conveyance, first in possession and then in remainder. Equity follows the law; and, where the legal estate is outstanding, conveyances of the equitable interest are construed and treated, in a Court of equity, in the same manner as conveyances of the legal estate are construed and treated at law. * * * The fact is that upon Harris' answer and before the Master as well as in the argument at the bar, the case of Harris was attempted to be put upon the decisions in *Dearle v. Hall* [3 Russ. 1], *Loveridge v. Cooper* [3 Russ. 30], and *Foster v. Blackstone* [1 Mylne & Keene, 297], decided by Sir John Leach and afterwards by the House of Lords. But, in each of those cases, the subject of discussion was a chose in action. * * *

¹ Part of the opinion is omitted.

The case before me is a case of real estate, not of a chose in action. John Jones, the first incumbrancer on the equity of redemption, took his title by the conveyances of January, 1826; and notice or possession was not necessary to complete his title. Harris took his title by a subsequent conveyance, and merely gave a notice, which did not and could not affect Jones. No fraud whatever can be imputed to Jones. He made some inquiry and was misled. He was the innocent subject of fraud, and not the doer of it; and, in my opinion, the exception must be sustained.

WILTSHIRE v. RABBITS.

(In Chancery, before Vice Chancellor Sir Lancelot Shadwell, 1844. 14 Simons, 76.)

George Rabbits by will dated August 9, 1822, bequeathed to Cicero Rabbits and George Bethell, leaseholds upon trust and charged them with payment of an annuity of £45. to his daughter, Frances, wife of Thomas Tovey for her separate use. By indenture dated June 30, 1866, Mr. and Mrs. Tovey mortgaged the annuity to Thomas Wiltshire to secure £500. and interest. Some years previously they had made a similar mortgage to Thomas Munday. Plaintiffs, Wiltshire's executors, claim priority over Munday on the ground that Wiltshire gave notice of his security first.

THE VICE CHANCELLOR. It is important to keep up the distinction between choses in action and chattel or freehold interests; and my opinion is that the effect of this will was to pass the legal interest in the leasehold estates, to the trustees, in trust for the testator's son for life, with remainder to his children; but charged with an annuity of £45. a year for the separate use of Mrs. Tovey; and that that is a chattel interest in equity, and not a chose in action, nor subject to any of the rules established with regard to assignments of choses in action. The consequence is that the person who took the first security, is entitled to priority over the person who took the second, notwithstanding the latter may have been beforehand with the former, in giving the trustees notice of his security.

WILMOT v. PIKE.

(In Chancery, before Vice Chancellor Sir James Wigram, 1845. 5 Hare, 14.)

In 1824, Washington Pike mortgaged a parcel of land to John Smith to secure £700. and interest. This mortgage was subsequently transferred to John Fearne. In May, 1826, Washington Pike conveyed to John Flewker the premises comprised in the first mortgage and also a second parcel of land by way of mortgage to secure £600.

loaned to Washington Pike by Sir Robert Wilmot. This mortgage contained a power of sale.

Sir Robert Wilmot died in 1834 and appointed plaintiffs his executors. In 1835 Washington Pike borrowed of plaintiffs £400. and gave them his bond therefor and an indenture by which he covenanted if the £400. was not paid by March 3rd next Flewker should sell the lands and from the proceeds pay the three sums of £700., £600. and £400.

In 1840 Washington Pike borrowed £300. from Flewker and mortgaged all of said premises to him as security. Flewker advanced this £300. and took said mortgage as security in ignorance of the loan by the plaintiffs of the £400.

In 1844 the executors of Sir Robert Wilmot filed their bill praying a sale of the mortgaged premises and the application of the proceeds in payment of the first mortgage of £700., and then in satisfaction of the subsequent mortgages of £600. and £400. to Sir Robert Wilmot and the plaintiffs.

By his answer Flewker claimed priority of his mortgage over the third mortgage given to secure the £400. to the plaintiffs.

VICE CHANCELLOR.¹ At the time the bill was filed, the legal estate in the property comprised in the first mortgage of June, 1834, was vested in Fearne, as first mortgagee, for securing £700. The property which was the subject of that mortgage, and also additional property, consisting of about 600 square yards of land, comprised in the deed of May, 1826, was vested in Flewker, as trustee, for securing £600. and interest to Sir Robert Wilmot. Flewker, therefore, as trustee, was second mortgagee of the property comprised in the first mortgage and first mortgagee of the additional property comprised in the mortgage of May, 1826. The question in the cause arises between the third and fourth mortgages of July, 1835, and July, 1840, respectively.

The defendant Flewker insists, that neither Fearne, the first mortgagee, nor himself as mortgagee in trust, had notice of the third mortgage at the time he advanced his money upon, and took the fourth mortgage: and he claims priority over the third mortgagee upon that ground.

In support of the argument he relies upon *Dearle v. Hall* [3 Russ. 1], *Loveridge v. Cooper* [3 Russ. 30], and *Foster v. Blackstone* [9 Bligh, N. R. 332]. He has also made a second point, namely, that, if his fourth mortgage is not entitled to priority over the third mortgage to the full extent, he is, at all events, entitled to such priority to the extent of the additional property comprised in the mortgage of May, 1826; and for this he relies upon the general proposition that he has the legal estate in that additional property, and had no notice of the third mortgage at the time he advanced his money on the fourth.

¹ Part of the opinion is omitted.

Now, with respect to the first point made by the defendant, I do not of course presume, at this day to question the authority of the cases upon which the defendant has relied. * * * However, in *Jones v. Jones* [8 Sim. 633], an attempt was made to apply *Dearle v. Hall* and the other cases to equitable interests in land; but the Vice Chancellor, upon the undoubted authority of cases to which he referred, showed that those cases had no application to cases of equitable interests in land; and with this opinion agree all the modern text-books.

The only question, therefore, in my opinion, is, whether the interest of Sir Robert Wilmot, under the mortgage of May, 1826, is to be considered as an interest in land, or an interest in money, to be produced by the sale of land. My opinion is, that his interest is that of a second mortgagee of the equity of redemption of the property in mortgage, notwithstanding the form of the security gives his trustee power of sale. * * * I think, therefore, upon the authority of the cases I have referred to, that the first point must be decided in the plaintiffs' favor.

Upon the second point made by the defendant Flewker, my opinion after some fluctuation, is, that the defendant is right. Suppose Flewker had sold under the power contained in the second mortgage as he had clearly a right to do, and, after retaining in his hands the sums of £700. and £600. to answer the respective claims of the first mortgagee and of Sir Robert Wilmot, to have paid over the surplus to Washington Pike,—could it be said that, by so doing, he had rendered himself liable for a breach of trust? It clearly could not. And again, if, instead of the sale which I have supposed, Washington Pike had contracted with the executors of Sir Robert Wilmot for a third mortgage to them, of which Flewker had no notice; and suppose, that, before the completion of that transaction, there had been a deed between Washington Pike of the first part, Flewker of the second part, and a fourth mortgagee, of the third part, by which Washington Pike had assigned over the equity of redemption of the estate to the fourth mortgagee, for the purpose of securing the payment of his debt; and that Flewker had then declared himself a trustee for that fourth person. Assuming, for a moment, that the effect of such a deed would have been to give the new mortgagee a priority over Sir Robert Wilmot's executors, I apprehend that it would clearly have been no breach of trust. Sir Robert Wilmot's executors not having given any notice to Flewker, the latter would have been justified in declaring such trusts of the surplus as Pike should direct. Then the question is, whether the effect of such a deed would have been to give a priority to the fourth mortgagee. Now, the general rule—the rule relied on by Mr. Wood as to equitable interests in land,—is the rule, "*Qui prior est in tempore potior est in jure*," and I have, on the former point, decided that neither the omission of one mortgagee to give notice nor the activity of the other,

would in the circumstances of that case, give the second mortgagee priority over the first. But, if a first incumbrancer has a declaration of trust only by the borrower, and none by the trustee, and the second incumbrancer has a formal mortgage of the equity of redemption, and the trustee is a party to the deed, and declares himself a trustee for the second incumbrancer, will not that declaration by the trustee give the second priority over the first? I think the second would, in that case, have a better right to call for the legal estate than the first; and if it would be so in the case of a stranger, I think the trustee cannot be precluded by his situation, as trustee from claiming the benefit of the legal estate without notice. His case, however, might perhaps, be supported upon the simple ground that he had the legal estate, and advanced his money without notice, leaving every trust of which he had notice untouched by his present claim. * * *

PHILLIPS v. PHILLIPS.

(In Chancery, before Lord Chancellor Westbury, 1861. 4 De Gex, Fisher & Jones, 208.)

THE LORD CHANCELLOR. When I reserved my judgment at the conclusion of the argument in this case, it was rather out of respect to that argument than from a feeling of any difficulty with regard to the question that had been so strenuously contested before me.

The case is a very simple one. The plaintiff claims as the grantee of an annuity granted by a deed dated in the month of February, 1820, to issue out of certain lands in the County of Monmouth, secured by powers of distress and entry. The annuity or rent charge was not to arise until the death of one Rebecca Phillips, who died in the month of December, 1839 and the first payment of the annuity became due on the 8th of March, 1840.

The case was argued on both sides on the admitted basis that the legal estate was outstanding in certain incumbrancers and is still outstanding. Subject to the annuity the grantor was entitled in fee simple in equity. In February, 1821, the grantor intermarried with one Mary Phillips. On the occasion of that marriage, a settlement dated in February, 1821, was executed and under this deed the defendants claim: and claim, therefore, as purchasers for a valuable consideration. No payment has ever been made in respect of the annuity.

The bill was filed within twenty years, and seeks the ordinary relief applicable to the case. The defendants by their answer insist that the deed was voluntary, and therefore void under the Statute of Elizabeth, as against them in their character as purchasers for valuable consideration, and they also insist upon the Statute of Limita-

tions. But in the answer the defence of purchase for valuable consideration without notice is not attempted to be raised.

At the hearing, an affidavit of Mary Phillips and another person was produced denying the fact of notice of the annuity at the time of the grant and at the time of the creation of the marriage settlement, and the contention at the bar was that the defence of purchase for valuable consideration without notice was available for the defendants under these circumstances and ought to be allowed as a bar to the claim by the court. The Vice Chancellor in his judgment refused to admit the defence of purchase for valuable consideration without notice, and I entirely agree with him in the conclusion that such a defence requires to be pleaded by the answer, more specially where an answer has been put in.

But I do not mean to rest my decision upon that particular ground because I have permitted the argument to proceed with reference to the general proposition, which was maintained before me with great energy and learning, viz. that the doctrine of the Court of Equity was this, that it would give no relief whatever to any claimant against a purchaser for valuable consideration without notice. It was urged upon me that authority to this effect was to be found in some recent decisions of this court, and particularly in the case decided at the Rolls of the Attorney General v. Wilkins [17 Beav. 285].

I undoubtedly was struck with the novelty and extent of the doctrine that was thus advanced, and in order to deal with the argument it becomes necessary to revert to elementary principles. I take it to be a clear proposition that every conveyance of an equitable interest is an innocent conveyance, that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to, and no more. If, therefore, a person seized of an equitable estate (the legal estate being outstanding), makes an assurance by way of mortgage or grants an annuity, and afterwards conveys the whole estate to a purchaser, he can grant to the purchaser that which he has, viz. the estate subject to the mortgage or annuity, and no more. The subsequent grantee takes only that which is left in the grantor. Hence grantees and incumbrancers claiming in equity take and are ranked according to the dates of their securities; and the maxim applies, "*Qui prior est tempore potior est jure.*" The first grantee is potior; that is, potentior. He has a better and superior—because a prior—equity. The first grantee has a right to be paid first, and it is quite immaterial whether the subsequent incumbrancers at the time when they took their securities and paid their money had notice of the first incumbrance or not. These elementary rules are recognized in the case of *Brace v. Duchess of Marlborough* [2 P. Wms. 491], and they are further illustrated by the familiar doctrine of the court as to tacking securities. It is well known that if there are three incumbrancers, and the third incumbrancer, at the time of his incum-

brance and payment of his money, had no notice of the second incumbrance, then, if the first mortgagee or incumbrance has the legal estate, and the third pays him off, and takes an assignment of his security and a conveyance of the legal estate, he is entitled to tack his third mortgage to the first mortgage which he has acquired, and to exclude the intermediate incumbrancer. But this doctrine is limited to the case where the first mortgagee has the legal title; for if the first mortgagee has not the legal title, the third does not by the transfer obtain the legal title, and the third mortgage by payment off of the first acquires no priority over the second. Now, the defence of a purchaser for valuable consideration is the creature of a court of equity, and it can never be used in a manner at variance with the elementary rules which have already been stated. It seems at first to have been used as a shield against the claim in equity of persons having a legal title. *Bassett v. Nosworthy* [Finch, 102] is, if not the earliest, the best early reported case on the subject. There the plaintiff claimed under a legal title, and this circumstance, together with the maxim which I have referred to, probably gave rise to the notion that this defence was good only against the legal title. But there appear to be three cases in which the use of this defence is most familiar:

First, where an application is made to an auxiliary jurisdiction of the court by the possessor of a legal title, as by an heir at law (which was the case in *Bassett v. Nosworthy*) or by a tenant for life for the delivery of title deeds (which was the case of *Wallwyn v. Lee* [9 Ves. 24], and the defendant pleads that he is a bona fide purchaser for valuable consideration without notice. In such a case the defence is good, and the reason given is that as against the purchaser for valuable consideration without notice the court gives no assistance; that is, no assistance to the legal title. But this rule does not apply where the court exercises a legal jurisdiction concurrently with courts of law. Thus it was decided by Lord Thurlow in *Williams v. Lambe* [3 B. C. C. 264], that the defence could not be pleaded to a bill for dower; and Sir J. Leach, in *Collins v. Archer* [1 Russ. & Mylne, 284], that it was no answer to a bill for tithes. In those cases the court of equity was not asked to give the plaintiff any equitable as distinguished from legal relief.

The second class of cases is the ordinary one of several purchasers or incumbrancers each claiming in equity, and one who is later and last in time succeeds in obtaining an outstanding legal estate not held upon existing trusts or a judgment, or any other legal advantage the possession of which may be a protection to himself or an embarrassment to other claimants. He will not be deprived of this advantage by a court of equity. To a bill filed against him for this purpose by a prior purchaser, or incumbrancer, the defendant may maintain the plea of purchase of valuable consideration without notice; for the principle is, that a court of equity will not disarm a purchaser, that is,

will not take from him the shield of any legal advantage. This is the common doctrine of the *tabula in naufragio*.

Thirdly, where there are circumstances that give rise to an equity as distinguished from an equitable estate,—as, for example, an equity to set aside a deed for fraud, or to correct is for mistake,—and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the court will not interfere.

Now these are the three cases in which the defence in question is most commonly found. None of them involve the case that is now before me.

It was indeed said at the bar that the defendants, being in possession, had a legal advantage in respect of the possession, of which they ought not to be deprived. But that is to confound the subject of adjudication with the means of determining it. The possession is the thing which is the subject of controversy, and is to be awarded by the court to one or to the other. But the subject of controversy, and the means of determining the right to that subject are perfectly different. The argument, in fact, amounts to this: "I ought not be deprived of possession, because I have possession." The purchaser will not be deprived of anything that gives him a legal right to the possession, but the possession itself must not be confounded with the right to it.

The case, therefore, that I have to decide is, the ordinary case of a person claiming under an innocent equitable conveyance that interest which existed in the grantor at the time when that conveyance was made. But, as I have already said, that interest was diminished by the estate that had been previously granted to the annuitant, and as there was no ground for pretending that the deed creating the annuity was a voluntary deed, so there is no ground whatever for contending that the estate of the person taking under the subsequent marriage settlement is not to be treated by this court, being an equitable estate, as subject to the antecedent annuity, just as effectually as if the annuity itself had been noticed and excepted out of the operation of the subsequent instrument.

I have no difficulty, therefore, in holding that the plea of purchase for valuable consideration is upon principle not at all applicable to the case before me, even if I could take notice of it as having been rightly and regularly raised.

We next come to examine the authorities upon which the defence relies. Now, undoubtedly, I cannot assent to some observations which I find attributed to the Master of the Rolls in the report of the case of the Attorney General v. Wilkins; but to the decision of that case, as explained by his Honor in the subsequent case of Colyer v. Finch [19 Beav. 500], I see no reasonable objection, and the principles that I have here been referring to are fully explained and acted on by the Master of the Rolls in the case of Colyer v. Finch. It is impossible, therefore, to suppose that he intended to lay down anything in the

case of the Attorney General v. Wilkins, which is at variance with the ordinary rules of the court as I have already explained them, or which could give countenance to the argument that has been raised before me at the bar.

I have consequently no difficulty in holding that the decree of his Honor, the Vice Chancellor, is right upon the grounds on which he placed it in the court below, and that also it would have been right if he had considered the grounds which have been urged before me in support of this petition of rehearing. I therefore affirm the decree and dismiss the petition of rehearing.

In re NEIL.

HEMMING v. NEIL.

(High Court of Justice, Chancery Division, 1890. 62 Law Times Reports, 649.)

Adjourned summons.

James Neil, who died in 1888, by his will dated November 8, 1875, devised and bequeathed all his real and personal estate to trustees in trust to sell and convert into money and to invest the proceeds in investments therein authorized and stand possessed of one-seventh part upon trust during the life of his son Philip to pay and apply the whole or any part of the income or accumulations of income for the support, maintenance, or education, or otherwise for the benefit of his son Philip, his wife and children, in such manner in all respects as his trustees should in their uncontrolled discretion think fit and to accumulate any residue of the income.

By indentures dated August 1, 1889, and August 14, 1889, Philip Neil mortgaged his interest to one R. C. A. Hemming to secure two sums of sixty pounds each. August 15, 1889, the trustees were notified of these assignments. The trustees continued to pay Philip weekly sums on account of the income of his share.

R. C. A. Hemming claimed to be entitled to an order for an account of the income of the share of Philip Neil since August 15, 1889 and of all payments made since that date, and that they be ordered to recoup him the aggregate amount of all such payments.

KEKEWICH, J. Mr. Renshaw argued that the intention of the testator was that there should be an application of a competent part only of the income of the son Philip Neil's share towards his support and maintenance, and he referred to *Re Sanderson's Trust* (3 Kay & Johns. 497). I have looked at the will in that case, and I find that the direction was every year during the life of the testator's brother to pay and apply the whole or any part of the rents, issues, and profits of the testator's real and personal estate and effects for and towards the maintenance, attendance, and comfort of the brother.

But in the present will there is a direction to accumulate all the residue of the income not applied under the discretionary trust for maintenance.

There was no such direction in the will in *Re Sanderson's Trust* (ubi sup.). Accordingly my mind is entirely set at rest as regards that objection. There is a distinct statement by the testator that the whole or any part of the income or accumulations of income of the share of his son Philip Neil may be applied for the support, maintenance, or education, or otherwise, for the benefit of that son, his wife and children, in such manner in all respects as the trustees shall in their uncontrolled discretion think fit. That conclusively shows that the trustees may exercise discretion whether they shall apply the whole or part only of the income. On that part of the case, therefore, my opinion is against the plaintiff. Then comes the second point. It appears that some moneys have been paid to or for the benefit of Philip Neil, since notice of the assignments of his interest was given to the solicitors for the trustees of the will, and the plaintiff seeks to make the trustees liable in respect of the payments so made. In determining that question the word which will guide me is the word "benefit" in the direction to the trustees to pay or apply the whole or any part of the income of his share. Philip is entitled to assign nothing but his beneficial interest under the will of the testator. Money paid to him or to any person on his behalf—excluding such a special case as that put by Cotton, L. J., in *Re Coleman, Henry v. Strong* (60 L. T. Rep. [N. S.] 127, 39 Ch. Div. 443)—is necessarily part of his beneficial interest. Mr. MacSweeney says that the money is not his until it is actually paid to him. I think that argument is more ingenious than sound. I think that it must be assumed that money paid by the trustees to him or to any person in his behalf was his in their irrevocable determination immediately before the payment. At that period of time they had notice and were affected with notice of the assignment. I think, therefore, the trustees are liable to pay to the plaintiff all moneys which have been paid by them to Philip Neil or to any person on his behalf, since the receipt by the trustees of the notice of the charge. An account must be taken of moneys so paid unless the parties can agree upon the amount.

DIBBS v. GOREN.

(In Chancery, before the Master of the Rolls, Lord Langdale, 1849. 11 Beavan, 483.)

In 1815, the testator made his will, giving his property to trustees on certain trusts for his children and grandchildren. He died in 1816 and the trustees, acting on their own notion of the effect of the trusts, proceeded in their performance. In 1836, a bill was filed for the administration, and it was then found, that the trustees had acted under

an erroneous view of the effect of the will; and it was so declared by the decree made in January, 1841.

It turned out, that two of the testator's children, Henrietta and John, had each received from the trustees the sum of £111., part of the trust property, to which they were not entitled, and that two other children, Charles and Robert, had also received £782. to which they were not, under the will, entitled.

These children were entitled to other interests under the will.

In 1828, John had assigned his interest under the will to Macdougall for valuable consideration.

Mr. Turner and Mr. Chandless now asked, that the sums so erroneously paid might be repaid out of the other funds coming to the testator's children, and for a lien. They cited *Priddy v. Rose* [3 Mer. 86].

Mr. Sheffield, for Macdougall, the assignee of John, argued that this equity did not apply to the assignee of John's interest. In *Priddy v. Rose* no notice was given to the trustee of the fund and Sir W. Grant relied on that fact.

THE MASTER OF THE ROLLS.¹ Where a trustee takes on himself to act upon his own authority, and pays to the parties beneficially interested sums to which they are not entitled, it becomes necessary for this court, to enforce the execution of the trust, by recovering back the sum thus received contrary to the trusts, * * *

Some of the parties have received a portion of the estate, to which they are not entitled. I cannot allow them to retain it.

The plaintiff is entitled to have these sums deducted from the shares of John and his assignee, and of Henrietta and Charles, with a declaration, that, until those sums have been recouped, they form a lien on the other moneys which may become due to them under the will.

WILKINS v. SIBLEY.

(In Chancery, before Vice Chancellor Sir John Stuart, 1863. 4 Giffard, 442.)

By a settlement dated the 9th and 10th October, 1828, executed on the marriage of Mr. and Mrs. Draper, a sum of £2700. 3 per cent. bank annuities was vested in Francis and Joseph Wilkins, upon trust, after marriage to pay the income to Mrs. Draper for life; after her death one moiety of the income to Mr. Draper for life; and, if no children of the marriage, to pay for Mr. Draper's life the other moiety of the income to Ann Wilkins, her mother, if then living, and, if not, then to the said Francis and Joseph Wilkins for their own use in equal shares; after the death of both Mr. and Mrs. Draper the whole income to Ann Wilkins for life, if living, or, if not, to the said Francis and Joseph Wilkins for their own use in equal shares.

¹ Part of the opinion is omitted.

Mrs. Draper died in July, 1845, without ever having had issue. Joseph Wilkins, the trustee, died in November, 1846, testate, leaving four infant children and bequeathing all his personal estate to the plaintiffs, Letitia Coles Wilkins and John Bailey, whom he appointed executors and trustees upon certain trusts for his wife and children.

Ann Wilkins died in 1848; and soon after her death Francis Wilkins sold half of the stock and divided the proceeds between himself and the plaintiffs, leaving £1350. 3 per cent. annuities standing in his name.

In January, 1855, Francis Wilkins mortgaged certain real estate to the defendant, Robert Sibley, to secure £700. and interest, and in April, 1851, he assigned to Sibley a moiety of the sum of £1350. stock as further security for the £700. and a further advance of £350. May 5, 1851, Sibley obtained a distringas on a moiety of the sum of £1350. bank annuities. Francis Wilkins in July, 1852, without the knowledge of plaintiffs sold out the sum of £675. and applied the proceeds to his own use and afterwards absconded. This sum was subsequently reduced by payment of costs to £612. 3s.

Mr. Draper died in 1860. Plaintiffs then claimed to be absolutely entitled to this sum of £612. The defendant, Robert Sibley, claimed the stock as assignee of Francis Wilkins.

The bill was filed for the administration of the trusts of the settlement.

THE VICE CHANCELLOR.¹ If a trustee who has also himself an interest in the trust fund assigns his beneficial interest therein, and then commits a breach of trust by abstracting any part of the trust fund, the other cestuis que trust, as against the assignee of the trustee's beneficial interest, have a clear equity to have the fund under the control of the Court applied to make good that breach of trust. In the case of *Morris v. Livie* [1 Y. & C. C. 380] that principle was established, and it is a doctrine recognized by many anterior cases. In the case of *Hopkins v. Gower* [1 Moll. 561] the same question occurred. The question there was as to a *devastavit*. Sir A. Hart says: "If an executor assigns his legacy and afterwards is guilty of a *devastavit*, the Court will lay its hand on the legacy, disregarding the assignment. Even if he was a stranger, the assignee of such a legatee takes only what the decree shall adjudge to him; and if an executor misconducts himself so that when the accounts are finally wound up he is subject to costs, the assignee of his legacy must bear the consequence."

According to that view of the law, at the time when the defendant Sibley proceeded to put a distringas on the stock, the stock upon which he was going to apply the distringas was subject to the equity claimed by the bill. That proposition cannot be questioned. But the argument here has turned principally upon the effect of the distringas. I have

¹ Part of the opinion is omitted.

been unable to see upon what possible ground the distringas in any degree relieved the fund on which it was placed from the equity which attached to it before the distringas was issued. * * *

The purpose of a distringas is to prevent a fund being dealt with without the person who issued it having an opportunity of asserting his claim. Here, then, it seems to me the fund in question was clearly liable to the equity of the plaintiff at the time when the defendant Sibley went to the bank with this distringas.

It has been said that the effect of a distringas is precisely the same as if this fund had been taken out of the name of one trustee and put into the name of another trustee. If that had been really done, other considerations would arise; but, practically, the distringas had no such effect; the effect was to give to Sibley an opportunity to establish his right to the fund in a Court of Equity.

It was the duty of the defendant Sibley to see, he being entitled to half the fund, that he took his assignment subject to the equity of the plaintiff. A distringas has no effect whatever as against the assignor, but the party must take subject to the same equity as before. The assignment can only be taken as operating like other deeds between assignor and assignee.

On a full view of the whole case I must hold that the effect of a distringas was not to take away the equity which so existed in another person, in respect, not of that share, but of the other share.

SECTION 2.—BY DEATH.

I. DEATH OF TRUSTEE.

FITZHERBERT'S ABRIDGMENT, SUBPCÆNA, pl. 8, 14.

Note. Choke said that he had once sued a subpcœna against the heir of feoffee and the matter was long debated; and the opinion of the chancellor and all the justices was that it did not lie against the heir, and so he sued a bill to Parliament for it. *Quære* if against the executor. *Trinity*, 8 Edw. IV, fol. 6.

Note that a subpcœna lies against the heir of the feoffee who survives. *Michaelmas*, 14 Edw. IV.¹

¹ See Y. B. 22 Edw. IV, fol. 6, pl. 18.

"For if he [the feoffee] makes a feoffment over the feoffor has no remedy against the feoffee. The law is the same if he dies. The heir of the feoffee is seised, as it seems to me, to his own use; for the confidence which the feoffor puts in the person of his feoffee cannot descend to his heir, nor pass to the feoffee of the feoffee; but he is feoffee to his own use as the law was taken

WESTON v. DANVERS.

(In Chancery, 1584. Toth. 105.)

The heir is not in equity bound to assure land, which his father bargained and took money for.

GELL v. VERMEDUN.

(In Chancery, 1694. Freem. Ch. 199.)

The defendant's ancestor, to whom he is heir, articulated in his lifetime for the sale of certain lands, which by the articles he covenanted to convey, but did not covenant for him and his heirs: and the question was whether the heir should be bound to perform this agreement. And held that he should, inasmuch as his ancestor, after the sealing

till the time of Hen. IV. But if the second feoffee has notice of the use, those in the chancery will at this day reform this by subpoena, and the heir of the feoffee upon confidence was seised to his own use till the commencement of Edw. IV and then began the subpoena against the heir and against the feoffee of the feoffee."—Keilwey, 46, Frowike, J.

At the present day, when the subject-matter of the trust is real estate and the trustee dies intestate leaving an heir, the heir takes the title subject to the trust. *Zabriskie v. Morris & Essex R. R. Co.*, 33 N. J. Eq. 22 (1880); Appeal of *Carlisle and Means*, 9 Watts (Pa.) 331 (1840); *Baird's Appeal*, 3 Watts & S. (Pa.) 459 (1842); *Watkins v. Specht*, 7 Cold. (Tenn.) 585 (1870); *Abbott, Adm'r, Petitioner*, 55 Me. 580 (1868).

When the subject of the trust is personal property, the title passes to the legal representative of the trustee subject to the trust. *Wheatley v. Purr*, 1 Keen, 551 (1837); *Veil v. Adm'rs of Mitchel*, 4 Wash. C. C. 105, Fed. Cas. No. 16,908 (1821); *Boone v. Citizens' Bank*, 84 N. Y. 83, 38 Am. Rep. 498 (1881); *Dick v. Pitchford*, 21 N. C. 480 (1837).

When there are two or more trustees, they hold the title as joint tenants, and on the death of one it survives to the others. *Lane v. Debenham*, 11 Hare, 188 (1853); *Saunders v. Schmaelzle*, 49 Cal. 59 (1874); *Gutman v. Buckler*, 69 Md. 7, 13 Atl. 635 (1888).

To-day, in England, real estate on the death of a sole trustee vests in his personal representative as if it were a chattel real. Land Transfer Act 1897 (St. 60 & 61 Vict. c. 65) § 1, subsec. 1. Subsection 4 of section 1 excludes land of copyhold tenure or customary freehold in any case in which an admittance or any act of the lord of the manor is necessary to perfect the title of a purchaser from a customary tenant.

In some jurisdictions, where a sole trustee dies, the trust vests in the court. *McDougald's Adm'r v. Carey*, 38 Ala. 320 (1862); *Read v. Rowan*, 107 Ala. 366, 18 South. 211 (1895); *Collier v. Blake*, 14 Kan. 250 (1875). In New York this rule was formerly limited to trusts of real estate. 1 Rev. St. (1st Ed.) p. 730, pt. 2, c. 1, tit. 2, § 68; *Bucklin v. Bucklin*, 1 Abb. Dec. 242 (1864); *Bunn v. Vaughn*, 1 Abb. Dec. 253 (1867). It is now extended to trusts of personality. *Laws 1902*, p. 423, c. 150.

In some jurisdictions the law of primogeniture still applies to land held in trust; the abolition by statute of the law of primogeniture applying only to lands held beneficially. *Boston Franklinite Co. v. Condit*, 19 N. J. Eq. 394 (1869); *Jenks v. Backhouse*, 1 Bin. (Pa.) 91 (1803); *Martin v. Price*, 2 Rich. Eq. (S. C.) 412, 470 (1846).

of the said articles, was in the nature of a trustee for the plaintiff of those lands, which trust with the said lands descended to the heir; and decreed accordingly.²

STEPHENS v. BAILY.

(In Chancery, before Tyrrill, J., 1665. Nels. 106.)

Lessee for another man's life contracts with the plaintiff for a sum of money to convey an estate to him, but dies before the conveyance was perfected.

The defendant, being the heir of the lessee per auter vie, enters, and holds the land as special occupant; and, a bill being brought against him to perfect the assurance, he demurred to it, and it was insisted for him that he was in possession as an occupant, and so was not privy to his father, who made the contract.

But it being referred to Justice Tyrrill, he certified that, having advised with the judges, he was of opinion that the defendant ought to answer; and so it was ordered.

ANONYMOUS.

(In Chancery, 1672. Freem. Ch. 155.)

Tenant of frank tenement descendible agrees to sell to B., and B. pays him part of the purchase money; the vendor dies, and his heir enters; the vendee exhibits his bill against him to have his contract executed. Resolved, by the Lord Keeper Bridgman and others, that the plaintiff shall not be relieved; for the heir is but special occupant, and does not claim under his father, and therefore the covenant or agreement of his father shall not oblige him to a conveyance of the land.³

HIX v. ATTORNEY GENERAL and Another.

(In Exchequer, 1661. Hardres, 176.)

Upon English bill the case was that Sir William Hix put £100. out at interest to the defendant, and took bond in the name of one Toomes, who afterwards became a *felo de se*; and now the plaintiff was relieved against the King upon this trust in equity, upon St. 33 Hen. VIII, c. 39. Sed quære whether that statute extends to any equity

² A portion of the case is omitted.

³ An occupant shall not be seised to any use: per Brudnell, J. Brooke's Abr. Feoffments al Uses, pl. 10.

against the King otherwise than in case of pleas by way of discharge. But it was likewise decreed in this cause that the plaintiff should be saved harmless from all others.

ATTORNEY GENERAL v. DUKE OF LEEDS.

(In Chancery, before the Master of the Rolls, Sir John Leach, 1833. 2 Mylne & K. 343.)

In the year 1807 Benjamin Clarkson purchased of Lord Lowther a copyhold estate, held of the manor of Wakefield, for the sum of £3,240. ; but, being unable to pay the whole of the purchase money, he borrowed of John Crosse a sum of £1,150., and paid the full price to Lord Lowther. The copyhold estate was surrendered to Crosse and his heirs; and Crosse was thereupon duly admitted. Crosse died in the year 1816, having by his will given all the residue of his personal property of what kind or nature soever, whether in the funds, on mortgage, or other securities, to the plaintiff George Buxton, whom he appointed his executor, upon trust to sell out such part of his property as consisted of stock, and expend the produce, together with all his other property, in furthering and promoting the cause of true religion among the inhabitants of Great Britain and Ireland. This devise being, as far as it affected his interest in the copyhold estate, void by the statute of mortmain, and Crosse having been illegitimate, the Crown claimed to be entitled to the £1,150, which Crosse had advanced to Clarkson upon the security of the copyhold estate.

A bill was filed by the executor of Crosse against the Attorney General for an account of the testator's personal estate; and, by an order made in that cause, it was declared that so much of the testator's estate as was placed out on, or arose from mortgages, belonged to the Crown, and that the residue thereof was given to charitable uses; and by a subsequent order the court directed that the Attorney General should be at liberty to institute a suit for the purpose of establishing the title of the Crown to the said mortgages, and to use the name of the executor of Crosse as a coplaintiff in such suit.

The present suit, by way of information and bill, was accordingly instituted by the Attorney General and the executor of Crosse against the Duke of Leeds, who claimed to be entitled by escheat to the copyhold premises in question as lord of the manor, against Sarah Clarkson, the widow and executrix of Benjamin Clarkson, to whom the Duke of Leeds had made a regrant of the copyhold premises, and against Alfred Clarkson, the infant son and customary heir of the mortgagor. The information and bill prayed that the defendants Sarah Clarkson and Alfred Clarkson might be decreed to pay to the Attorney General and the plaintiff the mortgage money and interest, or concur in a sale of the premises for the payment of the same, and

that the Duke of Leeds might be declared to be a trustee for his Majesty and for the person or persons entitled to the equity of redemption in the mortgaged premises.

The Attorney General and Mr. Wray, in support of the information and bill.

THE MASTER OF THE ROLLS considered the case too clear to require any argument in support of the title of the lord of the manor for whom Mr. Pemberton appeared.

The Attorney General declined making any further observations in support of the information.

THE MASTER OF THE ROLLS. Upon the facts of this case it appears that Crosse was, by the effect of the surrender to him, a trustee of the copyhold estate for himself to the extent of £1,150., and for Clarkson and his heirs after satisfying that sum. It was settled by the case of *Burgess v. Wheate*, 1 W. Bl. 123, that a cestui que trust has no title as against the lord who claims by escheat upon the death of a trustee without an heir. The decision in *Burgess v. Wheate* proceeded upon the principle, derived from the old feudal notion, that no tenant can be imposed upon the lord without his consent; and if a trust of a copyhold could be created as against the lord, it must necessarily follow that the lord might be entirely ignorant who was in truth the actual and beneficial tenant of the copyhold. It is for this reason that, in all mortgages of copyhold property, the surrender is upon the court roll expressed to be conditional, and to determine upon the repayment of the mortgage money. In this case the surrender was absolute. There was nothing upon the court roll to give the lord notice of a condition, nor is there any proof that the steward or deputy steward was aware of the real nature of the transaction.

The Duke of Leeds was therefore well entitled to enter upon the copyhold as an escheat upon the death of Crosse the apparent tenant to the lord without an heir.

Information and bill dismissed, but without costs.⁴

⁴ "A feoffee upon a trust at this day commits treason or felony; the land is lost and escheats, and the trust is extinct; for the King or lord by escheat cannot be seised to an use or trust; for they are in the post, and are paramount the confidence."—Jenkins, *Fourth Century*, c. 92. See, also, Jenkins, *Fifth Century*, c. 1, and *Sixth Century*, c. 30.

When a sole trustee of real estate dies in England to-day, the legal title does not escheat, but vests in his personal representative as if it were a chattel real. *Land Transfer Act 1897* (St. 60 & 61 Vict. c. 65) § 1. Subsection 4 of section 1 excepts lands of copyhold tenure and customary freehold in certain cases.

USES.—The King or lord, taking by escheat for failure of heirs of a feoffee to uses, was not bound by the use. *Brooke's Abr. Feoffments al Uses*, pl. 10, 40; *Dillam v. Frain*, 1 And. 309, 314; Y. B. 14 Hen. VIII, fol. 4, pl. 5.

In *Chudleigh's Case*, Coke, 122a (1589-95), Lord Coke said: "The lord by escheat, or lord of a villain, or who enters for mortmain, or who recovers in a cessavit, etc., shall not stand seised to an use, because he is in by title paramount to the use, sc. by force of a condition in law tacitly annexed to the land at the time of the creation of the seignory, and the tenancy came in lieu of

II. DEATH OF CESTUI QUE TRUST.

If a man enfeoff A. to his use and declare his will and then A. sells to R. and enfeoffs him, still, if A. gives notice to R. of the intent of the first feoffment, he shall be forced by subpœna to perform the will. If a tenant in borough English enfeoff two to the use of himself and his heirs, the younger son shall have the subpœna and not the eldest. If a man make a feoffment in trust of land descended to him on the part of his mother and dies without issue without declaring his will, the heir on the part of the mother shall have the subpœna. But if tenant in tail make a feoffment to his own use and die without issue without declaring his will, he in the reversion shall have the subpœna; but if tenant in tail, remainder over, make a feoffment in trust without declaring his will and die without issue, he in the remainder shall have the use. *Quære*. But if husband and wife are seised in right of the wife and the husband make a feoffment without declaring his will, the wife shall not have the subpœna. The reason seems to be that when a man makes a feoffment without consideration and expresses no use, the feoffment is by the law intended to be to the use of the feoffor and his heirs; so it seems to me that the cestui que in the reversion and in the remainder *supra* shall not have a subpœna, but a formedon and the wife a *cui in vita*.—Brooke's *Abr. Feoffment al Uses*, 32, citing 5 *Edw. IV.*, 7.⁵

his seignory which he had to his own use; and the writ of escheat saith, and which ad ipsum reverti debent tanqu' escaeta sua. And also they are not in in the per, that is to say, in privy of the estate to which the use was annexed, but in the post." Popham, C. J., at page 139b, said: "The reason why the lord by escheat, or the lord of a villain, should not stand seised to an use, is because the title of the lord is by reason of his elder title, and that grows, either by reason of the seignory of the lord, or of the villain, which title is higher and elder than the use or confidence is; and therefore should not be subject to it."

⁵ See *Y. B. 5 Edw. IV.*, fol. 7, pl. 16; *Y. B. 21 Edw. IV.*, fol. 24, pl. 10; *Y. B. 27 Hen. VIII.*, fol. 9, pl. 22.

A husband, entitled by statute to the personal property of his wife dying intestate, is entitled "to her equitable personal estate in the same manner as her legal personal estate."—*Bartlett v. Bartlett*, 137 *Mass.* 156 (1884).

"If, by a custom of a manor, land in fee ought to descend to the eldest daughter only, excluding the other daughters, there being no son, and a trust in equity descends to the heir, this shall go to the eldest daughter only, to be relieved thereupon in equity, according to the custom for the land. *P. 10 Car. II.*, *B.* between Jones and Lady Reusbie. The said custom found in *B. R.* by a jury at bar, and thereupon the same term decreed in chancery that the trust shall go to the eldest daughter alone."—22 *Vin. Abr. Uses (D)*, pl. 7.

"The *possessio fratris* of an use follows the analogy of descents at law. And so if a man, seised in fee of an use, had issue a son and a daughter by one venter, and a son by another venter, and devises it for years, and dies during the term, the daughter shall have it, and not the son; otherwise, it had been if he had devised it for life."—22 *Vin. Abr. Uses (D)* pl. 8.

ASTON and Another v. SMALLMAN and Another.

(In Chancery, before Lord Keeper Cowper, 1706. 2 Vern. 556.)

John Smith, being possessed of a lease for years which he held of the Lord Kilmurry, died intestate, leaving two daughters Eleanor and Mary. Tonna, their grandfather, and Dodd, the administrator of John Smith, surrender the old lease, and take a new one from the Lady Kilmurry to Tonna, the grandfather, and Dodd, the administrator, for ninety-nine years, if the two daughters and one John Leach, any or either of them, should so long live; but in trust, nevertheless, for the two daughters. Eleanor married Bradburne and died, and left three children. The defendant Smallman claimed under Eleanor in a course of administration, and had also got an assignment of the lease from the executor of Tonna, the surviving trustee. The plaintiffs claimed under Mary as administrators de bonis non to her, who survived her sister Eleanor, and brought their bill to compel the defendant Smallman to account for profits, and to assign the term to them.

The question was, Whether Mary, as joint tenant with her sister Eleanor, and surviving her, became entitled to the whole term by survivorship.

For the defendant it was insisted that, in this case, there ought not to be any survivorship allowed in equity; and as authorities cited the cases of Cox and Quaintock, 2 Ch. Cas. 238, and of Billingsley and Shore, 1 Vern. 482, and Draper's case, 2 Par. Chanc. Rep. 64.

LORD KEEPER. A trust of a term must go as the term at law would have done by the like limitations; and as survivorship would have taken place at law, it must do so in equity; and decreed the defendant to account for profits from the death of Eleanor, and to assign the term to the plaintiffs, or as they should appoint.

BROOKE'S ABRIDGMENT, FEOFFMENTS AL USES, pl. 34.

There are landlord and tenant; the tenant enfeoffs J. S. without declaring his will; the cestui que use commits a felony and is attainted. The lord shall not have a subpoena to have the land, and it seems the heir shall not have it, for there is a corruption of the blood and, therefore, it seems that the feoffees shall keep it to their own use.—5 Edw. IV, 7.⁶

⁶ See Countess de Bedford, 2 And. 200; Jenkins, Fourth Century, c. 92; Sixth Century, c. 30.

THE KING v. EXECUTORS OF SIR JOHN DACCOMBE.

(In Exchequer, 1618. Cro. Jac. 512.)

King James made a lease to Sir John Dacombe and others of the provision of wines for his Majesty's house for ten years, in trust for the Earl of Somerset. They made a lease for all the term except one month, rendering nine hundred pounds a year. The Earl of Somerset being afterwards attainted of felony, the question was, whether the trust which was for the said Earl was forfeited to the King by this attainder. And it was referred to all the justices of England, by command from the King, to be considered of, and to certify their opinions.

TANFIELD Chief Baron, now delivered all their opinions to be that this trust was forfeited to the King, and that the executor shall be compelled in equity to assign the residue of the term and the rent to the King. And he cited a case to be adjudged, 24 Eliz., where one Birket had given bond in another's name, and was afterwards outlawed, that the King should have this bond; and that in 24 Eliz. one Armstrong, being lessee for years, assigned the lease to another in trust for himself, and, being attainted of felony, this trust was forfeited to the King. But he said they all held, and so it was resolved in another case, that a trust in a freehold was not forfeited upon attainder of treason.

Note. This case I had from the report of Humphrey Davenport, who was of counsel in this case.

KING'S ATTORNEY v. SIR GEORGE SANDS.

(In Exchequer, 1669. Freem. Ch. 129.)

Sir Ralph Freeman purchased a lease for years of several manors; afterwards he purchased the inheritance thereof, in the name of Sir George Sands, being his son-in-law, in trust for Sir Ralph and his heirs; afterwards Sir Ralph made his will, and made Mr. Freeman his executor, and appointed that his said executor and Sir George Sands should convey part to Freeman Sands, and part to George Sands, the two sons of Sir George Sands, and their heirs; the residue to all the sons of Sir George Sands, by his then lady (Sir Ralph's daughter), and their heirs, who should be living at the time of his death, and then died. Sir George Sands, at the time of the death of Sir Ralph, had only Freeman Sands (who soon after died without issue) and the said George Sands; but afterwards Sir George had issue another son, called Freeman Sands. Mr. Freeman, the executor, refused the executorship, whereupon administration was granted to Sir George Sands; afterwards, no conveyance being made either of the lease or of the reversion by Sir George Sands, who had

both in trust, according to the will, Freeman Sands killed George, his brother, and was afterwards attainted of murder.

The question was, whether any of those trusts, either of the lease or of the reversion, that were so in Sir George, in trust as aforesaid, were forfeited to the King, of whom the lands were holden, by this felony and attainder; who, by the King's attorney sued Sir George on the equity side of the Exchequer to answer the profits to the King, supposing those trusts to be forfeited by the felony and attainder.

The case was several times argued at the bar, and this term Chief Baron HALE and Baron TURNER (RAINSFORD being removed into the King's Bench, and ATKINS disabled by age) both agreed that this trust was not forfeited.

In their arguments it was agreed, cestui que trust in fee, or fee tail, forfeit the same by attainder of treason, and the estate to be executed to the King in a court of equity, by 27 Hen. VIII, 10, and 33 Hen. VIII.

2. An alien cestui que trust of any estate, the estate belongs to the King; which, the Chief Baron said, was the opinion of the judges in Holland's Case [Aleyn, 14], 23 Car. I; and that an alien cannot purchase but for the King's use, and that he was of counsel in the case. See the case reported in Style, 20, 40.

3. As to the King's debt, by the common law, and by the practice of this court, which is of the common law, cestui que trust being indebted to the King, the King shall have execution of his debt on this trust; for before the statute made, 4 Hen. VII, 17, and 19 Hen. VII, 5, in the time of Hen. VI, there be precedents in this court, that the writ of extendi fac. for the levying of the King's debt, was of the debtor's land, or of any other land of which any other person was seised to his use, and this was the reason of Sir Edward Cooke's Case [2 Rolle, 294], where the interest of the King's debt did attach upon the power of the King's debtor to revoke a settlement made of his estate; and Pasch. 4 Jac. Ford's security, taken in trust for a recusant, was liable to the King's debt of £20. per North; so that where the King's debtor hath the profitable part of the estate, the King shall not lose his debt by any fiction.

4. It was agreed that the trust of the reversion would not be forfeited for felony; which the court held clear, and cited for authorities Marquis of Winchester's Case [3 Coke, 1]; Ford & Sheldon's Case, 12 Coke 1, 2; 5 Edw. IV, 7; Lord Darcy's Case, 2 Cro. 513; St. 33 Hen. VIII. And if the inheritance be forfeited for felony, it must be to the lord by escheat, which cannot be, because he hath cestui que estate for his tenant; and that no trust of an heir is forfeited for felony, appears by 27 Hen. VIII, 10, and there is no wrong to the lord as long as he hath a tenant, and therefore till the statute of 19 Hen. VII, 15, the lord could not seize the lands of which his vil-

lein was cestui que trust; and if it be demanded what shall become of his trust, as if tenant in fee of a rent charge dieth without heir, it is answered, the land shall be discharged of this trust, as if tenant in fee of a rent charge die without heir, or be attainted, the land is discharged.

Trust of a lease for years in gross may be forfeited by felony, or outlawry in a personal action. Earl of Somerset's Case; Dacomb's Case, 3 Cro. Jac. 512; Balington's Case.

Lease for years, if it be of never so long continuance, if it be assigned in trust for J. S. and his heirs, yet it shall go to his executors; yet trusts are ruled according to the style and course of courts of equity.

A real chattel in law survives to the husband, but not the trust [Freem. C. C. c. 32, p. 29, note 3] of a chattel real. Co. Lit. Cap. Remit. 351.

Cestui que trust of an inheritance binds himself and his heirs in a bond, this trust is not assets to the heir; though it hath since been questioned in the Lord Chancellor Hyde's time: but clearly the trust of a lease for years is assets to charge an executor in equity.

So a trust assigned over to wait upon the inheritance, though of a term shall go to the heirs, and heirs of the body, because a shadow kept on foot for a special purpose; and this hath a great resemblance to the case of charters, which go with the inheritance to the heir, but if granted over, the parchment and wax shall go to the grantee and his executors. 4 Hen. VII, 10.

And in the present case no trust of the chattel is forfeited to the King, because the lease for years was not in Freeman, who was attainted of felony, nor the trust in him as a chattel, for that he must have been executor and administrator of George, the son.

And here it was Sir Ralph's intent that the lease and inheritance should be confounded, and not kept separate; and, again, Freeman could have this trust but as heir to George, and as long as he hath the inheritance in him, and no longer, but it shall go to the heir as charters, nomine pœnæ, patronage by foundership, etc.; and the mischief otherwise would be great, to have such waiting terms forfeited by outlawry. And so judgment was given against the king's attorney.

BURGESS v. WHEATE.

(In Chancery, before Lord Keeper Henley, Lord Chief Justice Mansfield, and the Master of the Rolls, Sir Thomas Clarke, 1759. 1 W. Bl. 123.)

LORD KEEPER.⁷ * * * I. First I shall take notice of the claim of the Crown, because several of the arguments I shall make use of

⁷ The opinion of the Lord Keeper is much abridged, and the concurring opinion of the Master of the Rolls, Sir Thomas Clarke, and the dissenting opinion of Lord Chief Justice Mansfield are omitted.

on that, will tend to support the opinion I shall give on the other claims. The question on the information is, whether the cestui que trust dying without heirs, the trust is escheated to the Crown, so that the lands may be recovered in a court of equity by the Crown, or whether the trustee shall hold them for his own benefit. [States the case.] On 11 January, 1718, Mrs. Harding conveys to trustees (of whom Sir F. Page was the survivor) the lands in question, in trust for Mrs. Harding, her heirs and assigns, to the intent that she should appoint such estates thereout, and to such [persons] as she should think proper. Mrs. Harding dies without making any appointment, and without heirs ex parte paterna. The information charges, that the trustee took no benefit, but only for Elizabeth Harding, and to be subject to her appointment; and that she being dead sans heirs on the father's side, and having made no disposition of the estate, that Sir F. Page could take no estate for his own benefit by the deed or the fine, but takes it for the benefit of his Majesty, who stands in the place of the heir, and that the premises are escheated to his Majesty. The question, therefore, is entirely a question of tenure, and not of forfeiture.

I shall consider, first, the right of lords to escheat at law; secondly, whether they have received a different modification in a court of equity; thirdly, the arguments used in support of the information; and from the whole draw this conclusion, that the Crown has in this case no equity.

1. I shall consider the law of escheat, as settled by the municipal writers in the law, and reporters, and shall not regard what the law was in other countries; as they seem founded and calculated for empire and vassalage, to which I hope in this country we shall never be subject. * * * The legal right of escheat with us arises from the law of infeoffment to the tenant and his heirs, and then it returned to the lord, if the tenant died without heirs. The extension of the feoffment from the person of the tenant to the heirs special of his body, and then to his heirs and assigns, is accurately traced in a treatise of tenures by a learned hand [Sir M. Wright]. This reduces the condition of the reversion to this single event, viz. *Ob defectum tenentis de jure*. F. N. B. 337. A writ of escheat lies where the tenant in fee of any lands or tenements holds them of another, and tenant dies seised without heirs general or special, the lord shall have the land: because he shall have it in lieu of his services. The books are uniform, that in the case only of tenants, dying without heir, the escheat took place. As long as tenant or his heir, or, by his implied assent, another continued in possession by title, that prevented escheat. The law had no regard to the tenant's right to the land, but in right of his seisin. All these instances show, that where there was a tenant actually seised, though he had no right to the tenements, and though the person who had the right died without heirs, yet the

escheat was prevented. For if the lord has a tenant to perform the services, the land cannot revert in demesne. * * *

2. The next consideration is, whether a court of equity can consider it in a different light. Now, when the tenant did not die seised, and a proper legal tenant by title continued, and consequently, the lord's seignory and services continued; can this court say to the lord, "Your seignory is extinguished," and to the tenant, "Your tenancy is so, too," though both are legal rights now subsisting at law? In consideration of uses with regard to escheats, equity has proceeded on the same principle as the law, where there was a tenant of the land that performed the services. And I don't find this court has any regard to the *merum jus* of the tenant. Now, the reason why there was no escheat on the death of *cestui que use* in equity seems to be this (and it is a reason equally applicable to uses and trusts that the court had nothing to issue a subpoena upon, no equity, nothing to decree upon; and every person must bring an equity with him for the court to found its jurisdiction upon. It seems to me he could have no equity in the case of a use, or as owner of a trust, for the plain reason: An use before the statute could not be extended farther than the interest in the estate which the creator of the use could have enjoyed; as if the creator of the use had a fee simple in the land, he could take back no more interest in the use, either declared or resulting, than he had in the land; if he makes a feoffment, and declares no uses, it results to him in fee, which is to him, his heirs and assigns. The consequence is, that the moment he dies without heirs or assigns, there was no use remaining. How, then, can you come here for a subpoena (whether he took back the same or a different use) to execute a use or trust which was absolutely extinct? This seems to me the plain and substantial reason why, in this case (whether you call it a use or a trust), there was no basis on which to found a subpoena. * * *

My objection to the claim in the information is, not that it is to have a trust executed as if it were land, but it is to claim the execution of a trust, that does not exist. If there was a trust, I should consider it merely as an estate, and determine accordingly. But the creation of a trust can never affect the right of a third person. The trustee has the burden and the legal privilege. Can this court say it is a nullity? and yet it must be so said, to take it from the trustee. *Servet ad imum*. But it cannot be said it is a nullity in that respect, as to the trust accepted. The conveyance shall subject the trustee to all the fruits of tenure. Though he has continued subject to all burdens when the trust subsisted, yet now it is said, as Mrs. Harding is dead, you shall be considered so no longer. As between trustee and *cestui que trust*, to say it is a nullity must be with this restriction, that he shall take no beneficial interest that the *cestui que trust* can enjoy. But any other he may. And therefore in respect to members

sheriffs, coroners, the trustee was the person who had the right to exercise it; and the Legislature was forced to interpose, before the cestui que trust could have or enjoy that valuable privilege. [St. 7 & 8 Wm. III, c. 25, § 7.] * * *

Now it appears to me that at law there can be no escheat, while there is a tenant de jure. In equity there could be none, while trusts were called uses, and a trust and a use are exactly the same. How, then, can I say the lord shall lose his escheat, when any man for his own convenience puts his estate in trust? It seems, if I were to do so, that I should give law and equity, and not pronounce upon law and equity. * * *

Original bill dismissed as to all the rest, and the information on the part of the crown dismissed totally.⁸

TAYLOR v. HAYGARTH.

(In Chancery, before Vice Chancellor Sir Lancelot Shadwell, 1844. 14 Sim. 8.)

Sarah Whittell, the testatrix in the cause, by her will, dated in August, 1837, after giving £100. to each of her executors, and legacies of different amounts to other persons, gave all the rest of her property, real as well as personal, to the defendants, Haygarth, Dobson and Watson, their heirs, executors, etc., in trust to sell the same, absolutely, immediately after her death; and, for that purpose, to make contracts, transfers and conveyances, and to give discharges for the purchase money; and to invest the surplus, after paying the expenses of the sale, in their names, in the usual securities, and, out of the income, to pay certain annuities; and, subject thereto, to stand possessed of the capital in trust for such person or persons as she should direct by any codicil to her will; and she empowered the trustees to lease her real estates, from time to time, until they should be sold, for twenty-one years, if they should think fit so to do; and she appointed Haygarth, Dobson and Watson to be the executors of her will.

The testatrix died in January, 1838, seised and possessed of freehold, copyhold and personal estate, but without having made any codicil; and, as she was illegitimate and never had married, she left neither heir nor next of kin.

Her personal estate was more than sufficient to pay her funeral and testamentary expenses, debts and legacies, and to provide funds for payment of the annuities given by her will: the trustees, however, sold her real estate, and invested the greater part of the proceeds in the purchase of stock in their own names.

⁸ By the Intestates' Estates Act 1884 (St. 47 & 48 Vict. c. 71) § 4, trust estates in England were for the first time made subject to escheat.

At the hearing of the cause for further directions, the question was whether the residue of the personal estate and the proceeds of sale of the real estate, belonged to the Crown or to the trustees.

Mr. Walker and Mr. E. E. Montague appeared for the plaintiff.

Mr. Twiss and Mr. Wray appeared for the Attorney General.

Mr. Teed and Mr. F. H. Hall appeared for Haygarth and Dobson, and Mr. Koe and Mr. Chandless for Watson.

Mr. Cooke appeared for another defendant.

On Mr. Wray rising to reply,

THE VICE CHANCELLOR said: I will not trouble you to address any argument to me respecting that part of the testatrix's property which was personalty at her death.

The three executors not only have legacies of equal amount given to them; but the personal property is bequeathed to them in trust; and, as it is so bequeathed, they are precluded from claiming it for their own benefit, notwithstanding no trust is declared.

Lord Thurlow concludes his judgment in *Middleton v. Spicer* [1 Bro. C. C. 201] in the following words: "The executors being excluded and no relations to be found, I consider the executors as much trustees for the Crown, as they would have been for any of the next of kin, if these could have been discovered." Those words are strictly applicable to the present case; and, therefore, I am of opinion that the Crown is entitled to the testatrix's undisposed-of personal estate.

That being my clear opinion, I will thank you to confine yourself, in your reply, to that portion of the testatrix's property which was real estate at her death; and to which the position laid down by Lord Loughborough in *Walker v. Denne* [2 Ves. Jr. 185] seems to be applicable, namely, that the Crown comes under no head of equity.

[The argument of Mr. Wray in reply is omitted.]

THE VICE CHANCELLOR. This case has been argued for three days; so that I have had time to consider it and the authorities that bear upon it, which, in fact, are not numerous, but lie in a very small compass.

The construction of the will seems to be exceedingly simple and clear; and I have not the slightest doubt that, if any person had been named in a codicil, as an object of the trust created by the will, that person would have had a right to call for a conversion of the estate; and it would have been a mere matter of course for this court to decree the estate to be sold; my opinion being that the whole legal fee simple is vested in the devisees in trust; and that what is called the power of leasing was intended only to be used from time to time, until, in the opinion of the devisees in trust, a proper occasion had arisen for selling the estate.

It turns out that the testatrix did not make any codicil, and that she left neither next of kin nor heir; and I have already expressed an opinion, which, I think, is fully warranted by *Middleton v. Spi-*

cer, that the Crown is entitled to that part of the testatrix's property which was personal estate at the time of her death.

The only question that remains to be disposed of relates to the real estate. Now, whatever opinion might have been originally entertained about *Burgess v. Wheate*, 1 W. Bl. 123, it has remained unreversed for more than eighty years; and, consequently, it must be considered as binding upon the court. It is observable it was not the decision of one judge against another; but of Lord Keeper Henley and Sir Thomas Clarke, M. R., against the opinion of Lord Mansfield. The Master of the Rolls and the Lord Keeper argued upon a point of equity against the Chief Justice of the King's Bench. The case was nothing more than this. A legal estate was vested in a trustee, in trust for A. who died without an heir; and it was held that the trustee might hold for his own benefit; the Crown having no equity to claim on the ground of escheat. That was held by the Lord Keeper Henley and Sir Thomas Clarke against the opinion of Lord Mansfield; and, in deciding the present case, I must take it to be the law.

Now it was said that, inasmuch as there was, clearly, a direction, in the will, that the real estate should be sold, therefore the Crown is entitled to the money that might have arisen from the sale. Upon that point I referred to *Walker v. Denne* not so much for the decision as for the sake of the positive proposition which is laid down by Lord Loughborough in that case. His lordship says: "Then is there any reason to raise an equity to convert the money into a different species of property in order to create a different effect? There is no person claiming under the will of the testator appearing to insist that it shall be considered as that which de facto it is not. The Crown comes under no head of equity. I think it would be a great stretch even if that circumstance of the option was wanting; but, with that circumstance, to convert it for the Crown is too extraordinary for a court of equity." Therefore the broad proposition is that the Crown comes under no head of equity.

The distinction between the case of *Middleton v. Spicer* and the case now before me is that in the case of *Middleton v. Spicer* the subject of dispute was personal estate. It was a mere chattel real; and there is no doubt that, by the law of the land, the Crown is entitled to the undisposed-of personal estate of any person who happens to die without next of kin. There the property at the death of the testatrix did not require that there should be any act of a court of equity to give a foundation to the right of the Crown; but the Crown's right was independent of a court of equity. But here, in order to give a right to the Crown, it is absolutely necessary that the equity should be enforced, or at least enforceable, for the purpose of converting the freehold estate in fee simple into property of the description of personality; and the real question is whether, attending to the authorities, there is an equity to compel the conversion for the Crown. Now I

have the authority of the opinion expressed by Lord Loughborough against the existence of any such equity; and, without assuming to myself the jurisdiction of the House of Lords, and entering into the question whether the decision of Lord Chancellor Brougham in *Henchman v. The Attorney General* [2 Sim. & S. 498] is right or wrong, it is quite sufficient for me to say that, in making the decision which he did, he evidently referred to and relied upon the opinion expressed in the case of *Walker v. Denne*.

Then, as far as the question about the legal estate goes, I have the decision of a court of equity that the Crown shall not take by escheat. And I have the opinion of two Lord Chancellors in succession that there is no equity for the Crown to call for a conversion of the land, in order that it may take the produce of it. I admit that, if there had been any next of kin of this lady living at her death, who afterwards died without next of kin, then the principle of *Middleton v. Spicer* would directly have applied. Because the Crown would have come in, in the place of the next of kin of an individual, who had a clear right, in equity, to call for the conversion of the real estate.

The point seems to me to be so clear upon the authorities that I have thought it my duty to give my opinion upon it without delay; and, having regard to what was said by Lord Loughborough in *Walker v. Denne*, and by Lord Brougham, in reference to it, in *Henchman v. The Attorney General*, my opinion is that the Crown has no equity to take, from the devisees, the produce of the real estate which they have sold of their own authority.

The result is that, after providing for the payment of the annuities given by the will and for the costs of the parties, out of the personal estate and the proceeds of the sale of the real estate, pro rata, the remainder of the personal estate will belong to Her Majesty by virtue of her prerogative, and must be paid to such person as Her Majesty shall appoint under her sign manual; and the remainder of the proceeds of the sale of the real estate will belong to the defendants Haygarth, Dobson and Watson, and must be paid to them in equal third parts.

SECTION 3.—BY FORFEITURE.

PAWLETT v. ATTORNEY GENERAL.

(In Exchequer, 1667. Hardres, 465.)

In a bill to redeem a mortgage, the case appeared to be thus, viz.: The plaintiff had mortgaged lands in fee to one Ludlow for security of £3,000. with interest, and bound himself in a statute and recog-

nizance to perform the covenants of the mortgage, and to pay the money with interest at a certain day. The day past, the money unpaid. The mortgagee by his will devised all his goods, chattels, debts, and personal estate, his debts and legacies being paid, to his executor, and dies. Edmund Ludlow, son and heir of the mortgagee, is attainted of high treason by the new act of 12 Car. II. The King seizes; and the executor extends the plaintiff's lands upon the recognizance, who thereupon exhibits his bill against the King and the executor, and in it suggests that he could not pay the money at the day at the place appointed, viz. in the Strand in Middlesex, by reason of the plague; and that afterwards the mortgagee accepted the interest, and waived the forfeiture. And the question now upon a demurrer to the bill was, whether or no the plaintiff could have any remedy against the King, to have a redemption?

HALE, Chief Baron. This is a case of great concern, and deserves great consideration. It was made a question in this present Parliament in the House of Lords, in the Earl of Cleveland's Case, first, whether or no there be a right of redemption in this case against the King? And, secondly, if there be, what remedy must be taken? And I answered, as I take the law to be, that in natural justice redemption of a mortgage lies against the King. But to the other question I made no answer; because I took it to be a point of great importance. But I am of opinion, that the King cannot be compelled to reconvey; but that an *amoveas manum* only lies in such case. And this is all that can be done, if a trustee forfeit the estate. And it is to be considered here, whether or no there be a right of redemption against the lord by escheat (for so the King is in here, and not by his prerogative), and how the course of chancery is in case of the redemption of mortgages, who shall redeem, and against whom. I agree the case of a statute merchant, for he comes in merely by the party, viz. by the act of the party, and the remedy that the law gives thereupon; and it is worth inquiring how the precedents are, where a trustee for years is outlawed, and the lands seized, what remedy the *cestui que trust* has there? But admitting that case, yet it may be otherwise in case of a fee simple; as *cestui que trust* for years may forfeit his interest for felony; but *cestui que trust* in fee cannot; and I agree the case in 3 Edw. III. And I conceive that a mortgage is not merely a trust, but a title in equity. And the matter of redemption, it seems, is not the main business in the case; for Mr. Attorney General offers to give way to a redemption, upon payment of the money; but the point is, who shall have the money, whether the executor and devisee, or the King? for both contend for it.

And the Chief Baron further said: If the condition of a mortgage be to re-enter upon payment of the money to the executors or administrators, there without doubt the heir should not have the money after forfeiture; because the mortgagee looked upon it only as a chat-

tel; though if the word "heirs" were inserted into the condition, it would be more a question. But he said, he took the law to be the same in both cases. Yet he delivered no opinion in the principal case, but ordered a case to be made of it. And the cause was adjourned.

Afterwards in Hilary term, in annis 19 & 20 Car. II, it was argued again by counsel on both sides; and much to the same effect as before. And again the king's counsel insisted, that a mortgagor was not relievable against the King in equity:

First, because the King is not liable to a trust; and a mortgage forfeited is of the same nature.

Secondly, because by the escheat the ancient right and tenure is destroyed, and the King is in *jure coronæ*.

Thirdly, estates in dower, frank bank, tenancies by the curtesy, and of disseisors, are not liable to trusts, because they are in the post; otherwise of occupancies.

Fourthly, the chancery has no jurisdiction over the King's conscience, but over the consciences of subjects only; for that it is a power delegated by the King to the Chancellor, to exercise the King's equitable authority betwixt subject and subject. Nor is it within the statute of 33 Hen. VIII, c. 39, for equity against the king in the Exchequer. And they cited Abbot of Bury v. Bokenham, 1 Dyer, 8; King v. Boys, 3 Dyer, 283; Wikes' Case, Lane, 54; Lathbury v. Humfry, Yelv. 115; Bowle's Case, 11 Coke, 79.

HALE, Chief Baron. There is a diversity betwixt a trust and a power of redemption; for a trust is created by the contract of the party, and he may direct it as he pleaseth; and he may provide for the execution of it, and therefore one that comes in in the post shall not be liable to it without express mention made by the party; and the rules for executing a trust have often varied, and therefore they only are bound by it, who come in in privity of estate. A tenant in dower is bound by it, because she is in in the per, but not a tenant by the curtesy, who is in the post. So all who come in in privity of estate, or with notice, or without a consideration. But a power of redemption is an equitable right inherent in the land, and binds all persons in the post, or otherwise. Because it is an ancient right, which the party is entitled to in equity. And although by the escheat the tenure is extinguished, that will be nothing to the purpose, because the party may be recompensed for that by the court, by a decree for rent, or part of the land itself, or some other satisfaction. And it is of such consideration in the eye of the law, that the law takes notice of it, and makes it assignable and devisable.

But the most considerable things in the case are:

First, that the King is in actual possession, and cannot be removed in equity by an *amoveas manum*, as he may at law.

Secondly, whether there will not be a diversity betwixt the estate of a ward and an escheat: for in cases of wardships, the Court of Wards

had jurisdiction by the 33 of Hen. VIII, but in this case here is an actual inheritance in the King.

Thirdly, the statute of 33 Hen. VIII, c. 39, is to be considered, which gives relief in equity against the King. And I conceive clearly, that in this case the executor would be relieved against the heir for the money; because in common estimation it is but a personal estate.

But BARON ATKYNS was strongly of opinion that the party ought in this case to be relieved against the King, because the King is the fountain and head of justice and equity; and it shall not be presumed that he will be defective in either. And it would derogate from the King's honor to imagine, that what is equity against a common person, should not be equity against him.

SECTION 4.—BY DISSEISIN.

LORD COMPTON'S CASE.

(Common Bench, 1587. 2 Leon. 211.)

Note by ANDERSON, Chief Justice, that if cestui que use, after the statute of 1 Rich. III, leaseth for years and afterwards the feoffees release unto the lessee and his heirs, having notice of the use, that this release is unto the first use. But where the feoffees are disseised and they release unto the disseisor, although they (he?) have notice of the use, the same is to the use of the disseisor, and that no subpœna lieth against such a disseisor. See 11 Edw. IV, 8.⁹

If one disseise a feoffee to use, the disseisor will not be seised to the use, though he have notice.—*Dillam v. Frain*, 1 And. 309, 314.

First, that if there were any disseisin, that nothing passed to the plaintiff either in right or equity, for the disseisor was subject to no trust, nor any subpœna was maintainable against him, not only because he was in the post, but because the right of inheritance or freehold was determinable at the common law and not in the chancery, neither had cestui que use (while he had his being) any remedy in that case.—First Resolution of the Judges in *Earl of Worcester v. Finch*. 4 Inst. 85.

⁹ Same Case, 3 Leon. 196.

COLBURN and Others v. BROUGHTON and Others.

(Supreme Court of Alabama, 1846. 9 Ala. 351.)

Writ of Error to the Court of Chancery for the Fifth District.

Martha J. is the wife of James F. Colburn, and the other complainants are her children by him. December 25, 1829, John B. Bradford, the father of Mrs. Colburn, conveyed certain real estate to William C. Coolidge in trust for the separate use of Mrs. Colburn for life, and, should James B. Colburn die in her lifetime, then to convey the same to her for life and to the heirs of her body, by said James, in remainder. December 30, 1829, Bradford conveyed to Coolidge certain slaves in trust for the separate use of Mrs. Colburn for her life, and after her decease to be the absolute property of her children by J. B. Colburn.

December 25, 1839, Colburn, the husband, conveyed to Coolidge certain other slaves in trust for the separate use of Mrs. Colburn during her life and to the heirs of the bodies of James B. and Martha, in remainder, and, should they die without heirs, then the trustee to convey to the right heirs of the husband, in such manner as he should by last will appoint.

At the October term, 1835, one Smith was appointed as trustee in place of Coolidge. Smith resigned in November, 1838, and on November 30th Thomas Gaillard was appointed to act till the ensuing term of the circuit court of Monroe county, when the appointment might be confirmed or otherwise. Previous to the sitting of that court the Legislature divested it of jurisdiction, and the appointment, being temporary, expired, leaving Mrs. Colburn without a legal trustee to manage the trust property.

Edward S. Broughton, sheriff of Monroe county, by virtue of his office, became administrator de bonis non of the estate of William C. Coolidge, and obtained judgment against Colburn at the July term, 1839, for upwards of \$10,000, execution upon which issued July 16, 1839, under color of which the coroner forcibly took possession of the slaves and other personal property of the trust estate and evicted Mr. Gaillard the then acting trustee. The property was sold and the several persons named as defendants, became the purchasers and possession was delivered to them.

The bill prayed that the several deeds of trust be established and the trusts carried into execution, and an account taken of the trust estate that came to the hands of Coolidge, in his lifetime, and into that of the defendant. Broughton, Colburn and the purchasers at the sheriff's sale were made parties defendant.

The chancellor dismissed the bill, and his decree was assigned as error.

GOLDTHWAITE, J.¹⁰ * * * 3. But there is a more serious objection yet to the bill, so far as the individual purchasers at the coroner's sale are connected with it. We readily concede that a purchaser of trust property from or under the trustee, with notice of the trust, is himself chargeable in equity as a trustee. But here there is nothing to connect these individuals with the trustee, and they claim adversely to him; it is not his title which they held, or one derived through him, but their claim if good at all is so entirely independent of the trust deed. To insist that equity can take jurisdiction of a title thus disputed would invest it with cognizance of all disputes concerning property upon which a trust had ever been created.

It is entirely evident that the property held in trust is as much the subject of inquiry as that which is not, but it is too common a mistake to suppose the creation of a trust carries the property itself into equity. The law usually provides a different and more appropriate forum to determine conflicting and adverse titles to the property. We fully recognize the rule that a purchaser of trust property from or under the trustee, with notice of the trust, is himself chargeable in equity as a trustee. [Williamson v. Bank, 7 Ala. 906, 42 Am. Dec. 617.] But, according to the allegations of the bill, Broughton never had possession of the property sold, as the administrator of Coolidge, and was not therefore affected by the obligations which his intestate had assumed with relation to it. He obtains a judgment against Colburn, and directs a levy upon property which that person is supposed to own. In doing this, we apprehend he stands as any other plaintiff who wrongfully directs a levy, and is responsible to the injured party in trespass or trover. The title sold under his execution was not the title of Coolidge, the trustee, but that of a third person, which, if defective, invests the purchaser with one that is of the same nature. Whatever may be the merits of this title, the purchaser, it is evident, does not derive it from the trustee, either mediately or immediately, and in no sense can be said to be in collusion with or holding under him. In point of fact, the whole case, as to these purchasers, makes it apparent they claim adversely to the trust estate, and in spite of it. It is then, as to all the defendants except the husband, an attempt to litigate the title to personal property in a court of equity. We know of no condition of facts under which a court of this description can determine such a question. Doubtless a cestui que trust may go into equity to prevent a sale of the trust estate, until the right can be asserted elsewhere. To this effect is Calhoun v. Cozens, 3 Ala. 498, where an injunction was sustained by a feme covert to restrain a husband's creditor from selling her separate estate. Here, however, the property has already been converted, and the suit is to regain or have satisfaction for it, from persons who neither claim under nor are in privity with the trustee.

¹⁰ Part of the opinion is omitted.

4. The mere circumstance that a trust is created upon certain property does not invest a court of chancery with jurisdiction to determine the disputes which may arise with respect to the title to that property. If it was so, every cestui que trust might sue in equity, instead of his trustee at law for injuries done to it. Lord Redesdale said a cestui que trust is always barred by length of time operating against the trustee. If the latter does not enter, and the cestui que trust does not compel him to enter as to the person claiming paramount, the cestui que trust is barred. [Hovenden v. Lord Annesly, 2 Sch. & L. 629.] And Lord of Hardwicke had before held the rule applied only as between cestui que trust and trustee, and not between them on the one side and a stranger on the other. [Lewellen v. Mackworth, 2 Eq. Cas. Abr. 579.] In Finch's Case, 4 Inst. 85, so long ago as the reign of Elizabeth, it was resolved by all the judges that a disseisor was subject to no trust, nor any subpoena was maintainable against him; not only because he was in the post, but because the right of inheritance or freehold was determinable at the common law, and not in chancery; neither had the cestui que trust any remedy in that case. To the same effect is Mr. Sugden, in his edition of Gilbert on Uses, 429, note G, who there says that persons claiming the legal estate by an actual disseisin, without collusion with the trustee, will not be bound by the trust. Therefore, if J. oust A., who is a trustee for B., and the claim is not made in due time, A. will be barred, and his cestui que trust with him, although J. had notice of the trust. These citations seem conclusive to show that the creation of a trust has no effect to draw the contests with respect to the title of the property to a court of chancery, and that it is only persons who are trustees, or who claim under such, or by collusion with them, who are accountable to the cestui que trust.

Decree affirmed.¹¹

¹¹ USES.—In Chudleigh's Case, 1 Coke, 113b, at 139b (1589-95), Popham, C. J., said: "And the reason why a disseisor should not stand seised to a use was because cestui que use had no remedy by the common law for any use, but his remedy was only in chancery, and, because the right of a freehold or inheritance could not be determined in chancery, his title should not be drawn into examination there; and for this reason a disseisor shall not be compelled in the chancery to execute an estate to cestui que use, but cestui que use shall compel his feoffees in the court of chancery to enter upon the disseisor, or to recover the land against him at the common law, and then the chancery will compel the feoffees to execute the estate according to the use, and the chancellor ought to direct uses according to the rules of the common law."

SECTION 5.—BY MARRIAGE.

I. MARRIAGE OF THE TRUSTEE.

NASH v. PRESTON.

(King's Bench, 1631. 4 Cro. Car. 190.)

A bill in chancery was referred to Jones, Justice, and myself, to consider whether one should be relieved against dower demanded, etc.

The case appeared to be, that J. S. being seised in fee, by indenture inrolled bargains and sells to the husband for one hundred and twenty pounds, in consideration, that he shall redemise it to him and his wife for their lives, rendering a peppercorn; and with a condition, that if he paid the one hundred and twenty pounds at the end of twenty years, the bargain and sale shall be void. He redemiseth it accordingly and dies; his wife brings dower.

The question was, whether the plaintiff shall be relieved against this title of dower?

We conceived it to be against equity, and the agreement of the husband at the time of the purchase, that she should have it against the lessees; for it was intended that they should have it redemised immediately to them, as soon as they parted with it; and it is but in nature of a mortgage: and upon a mortgage, if land be redeemed, the wife of the mortgagee shall not have dower. And if a husband take a fine sur cognizance de droit come ceo, and render arrear, although it was once the husband's, yet his wife shall not have dower; for it is in him and out of him quasi uno flatu, and by one and the same act. Yet in this case we conceived, that by the law she is to have dower; for, by the bargain and sale, the land is vested in the husband, and thereby his wife entitled to have dower; and when he redemises it upon the former agreement, yet the lessees are to receive it subject to this title of dower; and it was his folly that he did not conjoin another with the bargainee, as is the ancient course in mortgages. And when she is dowable by act or rule in law, a court of equity shall not bar her to claim her dower; for it is against the rule of law, viz.: "Where no fraud or covin is, a court of equity will not relieve." And upon conference with other the Justices at Sergeants Inn upon this question, who were of the same judgment, we certified our opinion to the Court of Chancery, that the wife of the bargainee was to have dower, and that a court of equity ought not to preclude her thereof.

NOEL v. JEVON.

(In Chancery, before Lord Chancellor Nottingham, 1678. Freem. Ch. 42.)

The bill was to be relieved against the defendant's dower, her husband being only a trustee; and it appearing that the husband was but a trustee, the defendant was barred of her dower, contrary to the opinion of *Nash v. Preston* [4 Cro. Car. 190]; and so it was said is the constant practice of the court now.¹²

II. MARRIAGE OF THE CESTUI QUE TRUST—RIGHTS OF WIFE.

COLT v. COLT.

(In Chancery, 1664, 1665. 1 Ch. R. 254.)

The plaintiff claims a third part of the said trust for her dower. This court, to so much of the plaintiff's bill as relates to the dower of the plaintiff Elizabeth claimed by her out of the said trust, ordered that the said bill be dismissed.¹³

¹² See *Bevant v. Pope*, Freem. Ch. 71 (1681); *Hinton v. Hinton*, 2 Ves. Sr. 631 (1755); *Dean's Heirs v. Mitchell's Heirs*, 4 J. J. Marsh. (Ky.) 451 (1830); *Firestone v. Firestone*, 2 Ohio St. 415 (1853); *Bopp v. Fox*, 63 Ill. 540 (1872).

A wife has no homestead interest in land held by a husband as trustee. *Osborn v. Strachan*, 32 Kan. 52, 3 Pac. 767 (1884).

CURTSEY.—A husband is not entitled to curtesy in lands held by his wife in trust. *King v. Bushnell*, 121 Ill. 656, 13 N. E. 245 (1887); *Chew v. Commissioners*, 5 Rawle (Pa.) 160 (1835).

USES.—The wife of a feoffee to uses was entitled to dower. Y. B. 14 Hen. VIII, fol. 4, pl. 5; *Brooke's Abr. Feoffments al Uses*, pl. 10, 40. The husband of the feoffee to uses was entitled to curtesy. *Brooke's Abr. Feoffments al Uses*, pl. 10, 40.

¹³ The wife had no dower in an equity of redemption. *Dixon v. Saville*, 1 Bro. C. C. 326 (1783). The wife had no customary dower in a copyhold held in trust by her husband. *Godwin v. Winsmore*, 2 Atk. 525 (1742). The widow of a cestui que trust of a copyhold was not entitled to freebench. *Forder v. Wade*, 4 Bro. C. C. 521 (1793).

To-day in most jurisdictions dower in equitable interests is allowed by statute. The former rule still prevails in Delaware, Massachusetts, and New Hampshire. *Cornog v. Cornog*, 3 Del. Ch. 407 (1869); *Seaman v. Harmon*, 192 Mass. 5, 78 N. E. 301 (1906); *Hallett v. Parker*, 69 N. H. 134, 39 Atl. 583 (1897). Frequently dower is allowed in an equity of redemption, though not in other equitable interests. *Cornog v. Cornog*, 3 Del. Ch. 407 (1869); *Lobdell v. Hayes*, 4 Allen (Mass.) 187 (1862). No dower in an equity of redemption is allowed in the District of Columbia. In *re Thompson's Estate*, 6 Mackey (D. C.) 536 (1888). In New York dower is allowed in such equitable interests only as the husband retains at his death. *Hawley v. James*, 5 Paige, 318, 453, 454 (1835); In *re Ransom* (D. C.) 17 Fed. 331 (1883).

CHAPLIN v. CHAPLIN.

(In Chancery, before Lord Chancellor Talbot, 1733. 3 P. Wms. 229.)

The legal estate of a rent in fee was in trustees, in trust for Porter Chaplin in tail male; on his dying, the trust of this estate tail descended to his only son Sir John Chaplin in tail, the husband of the plaintiff the Lady Chaplin, who (inter alia) brought her bill for her dower of this rent.

LORD CHANCELLOR TALBOT. By the preamble of the statute of uses it is recited that by means of these uses the wife was defeated of her dower, by which it appears that the wife of cestuy que use was not dowable at common law; and if so, then, as at common law an use was the same as a trust is now, it follows, that the wife can no more be endowed of a trust now, than at common law, and before the statute, she could be endowed of a use; so that here was the opinion of the whole Parliament in the point: that it had been the common practice of conveyancers, agreeable hereto, to place the legal estate in trustees on purpose to prevent dower; wherefore it would be of the most dangerous consequence to titles, and throw things into confusion, contrary to former opinions, and the advice of so many eminent and learned men, to let in the claim of dower upon trust estates; that he took it to be settled, that the husband should be tenant by the curtesy of a trust, though the wife could not have dower thereof; for which diversity, as he could see no reason, so neither should he have made it; but since it had prevailed, he would not alter it; that there did not appear to be so much as one single case, where abstracting from all other circumstances, it had been determined there should be dower of a trust. For which reason, his lordship dismissed the bill as to such part of it as claimed dower of the trust of this rent.¹⁴

WATTS et al. v. BALL et al.

(In Chancery, before Lord Chancellor Cowper, 1708. 1 P. Wms. 108.)

The case in effect was: One seized of lands in fee had two daughters, and devised his lands to trustees in fee, in trust to pay his debts, and to convey the surplus to his daughters equally.

¹⁴ See *D'Arcy v. Blake*, 2 Sch. & L. 387 (1805).

The widow of a cestui que use was not entitled to dower. *Y. B. 13 Hen. VII.*, fol. 7, pl. 3; *Crumwel v. Andros*, 2 And. 69, 75 (1597); *Dillam v. Frain*, 1 And. 309, 321; *Perkins*, 349; *Doctor & Student*, Dial. II, c. 22; *Vernon's Case*, 4 Coke, 1 a, 1 b (1572); Preamble to Statute of Uses, 27 Hen. VIII, c. 10.

The younger daughter married and died, leaving an infant son and her husband surviving.

The eldest daughter brought a bill for a partition; and the only question was, whether the husband of the younger daughter should have an estate for life conveyed to him, as tenant by the curtesy?

The husband in his answer had sworn that he married the younger daughter, upon a presumption that she was seized in fee of a legal estate in the moiety; that at the time of the marriage she was in the actual receipt of the profits of such moiety; and it was admitted that this trust was not discovered until after the death of the younger daughter, nor until it was agreed that a partition should be made.

Decreed by LORD CHANCELLOR that trust estates were to be governed by the same rules, and were within the same reason, as legal estates; and as the husband should have been tenant by the curtesy, had it been a legal estate, so should he be of this trust estate; and if there were not the same rules of property in all courts, all things would be, as it were, at sea, and under the greatest uncertainty.

His lordship added that, this being a case of some difficulty, he could have wished it had not come before him as a cause by consent; but his opinion was that the husband ought to be tenant by the curtesy, and the rather because it appeared that he, upon his marriage did conceive and presume his wife to be seized of a legal estate in the moiety, and had reason to think so, she being in possession thereof.

Wherefore it was decreed that an estate for life in a moiety in severalty should be conveyed by the trustees to the husband, with remainder in fee to his son.

In this cause Mr. How (who was for the husband) cited the case of *Sweetapple v. Bindon*, 2 Vern. 536, where money was devised to be laid out for the benefit of a feme sole in the purchase of lands in fee; the feme married, and had issue, and died, the husband surviving; and decreed in equity that though the money was not invested in a purchase during the life of the wife, yet in regard, in this case, if it had been so laid out the husband would have been tenant by the curtesy, and that this was as land in equity, therefore the husband was equally entitled.¹⁵

¹⁵ A husband of a cestui que use was not entitled to curtesy. Brooke's Abr. Feoffments al Uses, pl. 10, 40; Doctor and Student Dial. II, Ch. 22; Perkins, 457, 463; Preamble to Statute of Uses, 27 H. VIII, c. 10.

III. MARRIAGE OF CESTUI QUE TRUST—RIGHTS OF HUSBAND.

MORGAN v. MORGAN.

(In Chancery, before Vice Chancellor Sir John Leach, 1820. 5 Madd. 408.)

This was a bill filed by a son against his father, to avoid a contract made between them, for the division of the price of lands to be sold, upon the ground that the contract proceeded upon the notion that the father was tenant for life of the lands, and the son tenant in fee in remainder, though in truth the son, the plaintiff, was tenant in fee in possession.

The lands in question had been the estate of the mother.

By a settlement made previous to the marriage of the father with the mother, the estate of the mother was conveyed to trustees in fee upon trust, for the sole and separate use of the mother for life, with power to the mother to appoint the fee by deed or will, and, for want of appointment, in trust for the mother, her heirs and assigns. The question was, whether the father, who survived the mother, was entitled to be tenant by the curtesy against the son, the mother having made no appointment.

Mr. Hart and Mr. Daniel, for the plaintiff, admitted the general rule was, that a husband was entitled to curtesy in the equitable estate of his wife, but contended, that the rule did not apply in this case, by reason, that during the life of the wife, the profits were to be paid to her separate use, and they cited the case of *Herle v. Greenbank* [3 Atk. 715] as directly in point.

Mr. Beames, for the defendant.

It will be conceded that courts of equity give the husband a tenancy by the curtesy of a trust. Such courts have likewise held that there should be curtesy of an equity of redemption, though the mortgage was in fee, *Cashbourn v. Scarfe* and *English* [1 Atk. 603]; and where there was a bequest of £300. to be laid out in land, and settled to the only use of M. and her children, the husband of M. was held entitled to curtesy, *Sweetapple v. Bindon* [2 Vern. 536]; so, where there was a devise to pay debts, and the surplus to be conveyed to a feme, the husband was held entitled to a curtesy in the surplus, *Watts v. Ball* [1 P. Wms. 107]. But it is contended that, though the husband is entitled to a tenancy by curtesy of a trust, the present is the excepted case, namely, where the property is settled to the separate use of the wife; and for this they rely on *Herle v. Greenbank* [3 Atk. 715]. That case, however, stands alone, and is not to be reconciled to Lord Hardwicke's general

doctrine in *Roberts v. Dixwell* [1 Atk. 607], where he says a devise to the separate use would not bar the husband, because there was, as here, a sort of seisin in the wife; nor is *Herle v. Greenbank* to be reconciled to the doctrine of *Cashbourn v. Scarfe*, and *Sweetapple v. Bindon*, and *Watts v. Ball*. If *Herle v. Greenbank* be questionable, then there was in the removal of doubt a sufficient consideration for the agreement of the 14th September, 1812, and that agreement is good, as a family compromise, as in *Stockley v. Stockley* [1 Ves. & B. 30] and in *Stapilton v. Stapilton* [1 Atk. 2], *Cann v. Cann* [1 P. Wms. 723] and other cases cited in *Stockley v. Stockley*.

THE VICE CHANCELLOR.¹⁶ It must be admitted that the two cases of *Herle v. Greenbank* and *Roberts v. Dixwell* cannot be reconciled, and between the conflicting opinions of Lord Hardwicke recourse must be had to principle and analogy. At law the husband is entitled to curtesy, wherever the wife, during the coverture, is seised of an estate of inheritance, and has issue by the husband capable of that inheritance.

Equity follows the law, in the quality of estates, and it is to be stated generally that a husband will become tenant by the curtesy, wherever the wife, during the coverture, is in possession of an equitable estate of inheritance, and has issue by the husband capable of that inheritance. There is no doubt here that the wife had an equitable estate of inheritance, notwithstanding the rents and profits were to be paid to her separate use for life. * * * The wife was in possession of this equitable estate by receipt of the rents and profits during the coverture, and, there being issue capable of inheritance, the husband, according to the rule stated, must be entitled to the curtesy, unless it can be held that the direction that the wife shall take the profits to her separate use amounts to an express intention to exclude him. At law, the husband cannot be excluded from the enjoyment of property given to or settled upon the wife; but in equity he may, and this not only partially, as by a direction to pay the rents and profits to the separate use of the wife during coverture, but wholly, by a direction that, upon the death of the wife, the inheritance shall descend to the heir of the wife, and that the husband shall not be entitled to be tenant by the curtesy. Such a provision was actually made in the case of *Bennett v. Davis* [2 P. Wms. 316], and was acted upon by this court. Here the husband is partially, and not wholly, excluded from the enjoyment of his wife's property. This court would, according to the intention of the settlement, have restrained him from all interference with the rents and profits during the life of the wife, but there being no further exclusion expressed in the settlement, the court

¹⁶ Part of the opinion is omitted.

can have no authority to restrain him from enjoying his general right as tenant by the curtesy in the equitable inheritance of his wife. Bill dismissed.¹⁷

CLAUSSEN v. LA FRANZ.

(Supreme Court of Iowa, 1855. 1 Iowa, 226.)

Action of right by plaintiff as the guardian of the minor children of Peter C. Burmeister, deceased, against La Franz, to recover the possession, and rents and profits, of certain real estate. In 1847 Burmeister agreed to buy a lot in the city of Davenport and paid of the purchase money \$100. He lived in the house on said lot till his death, September 5, 1847, at which time no deed had been executed by the vendor. Before Burmeister's death, with \$400 furnished by him, Cook & Sargent bought from the United States two quarter sections of land and took title in the same of George B. Sargent. Sargent, after Burmeister's death, conveyed this land to his widow, Maria E. Burmeister. She also, out of Burmeister's estate, paid \$1,900, the balance of the purchase price of the lot and took a deed in her own name. Soon after obtaining the deeds for the land and lot she married defendant, and he thereupon took possession of said premises and has ever since continued in possession and received the rents and profit. Shortly after her marriage with defendant the said Maria E. on July 6, 1853, made her declaration of trust in behalf of said infant children and on September 12, 1853, conveyed all of said premises to said children.

Defendant by his answer alleged that the premises were the property of his wife, who was, at the time of their intermarriage, seised of an estate of inheritance in fee simple, and that he had the right to the rents and profits arising out of the same.

A replication was filed stating that the said Maria E., at the time of said intermarriage and at the time of said declaration of trust

¹⁷ See *Follett v. Tyrer*, 14 Sim. 125 (1844); *Cushing v. Blake*, 30 N. J. Eq. 689 (1879).

The husband may be deprived of curtesy by an alienation of her inheritance by the wife by deed or will, *Cooper v. McDonald*, L. R. 7 Ch. Div. 288 (1877); *Pool v. Blakie*, 53 Ill. 495 (1870); unless prevented by statute, as in *Soltan v. Soltan*, 93 Mo. 307, 6 S. W. 95 (1887).

The notion advanced by Sir John Leach that the creator of a trust for the separate use of the wife may exclude the husband from curtesy has been approved by the courts of Kentucky and Pennsylvania. *Rautenbusch v. Donaldson* (Ky.) 18 S. W. 536 (1892); *Cochran v. O'Hern*, 4 Watts & S. 95, 39 Am. Dec. 60 (1842); *Rigler v. Cloud*, 14 Pa. 361 (1850). There are dicta in other jurisdictions to the same effect. *Cushing v. Blake*, 30 N. J. Eq. 689, 697 (1879); *Tillinghast v. Coggeshall*, 7 R. I. 383, 394 (1863); *Baker v. Heiskell*, 1 Cold. (Tenn.) 641, 643 (1860); *Dugger v. Dugger*, 84 Va. 130, 144, 4 S. E. 171 (1887). This dictum, however, seems fully answered by what is said in *Lewin's Law of Trusts* (11th Eng. Ed.) pp. 925, 926.

and said conveyance to said heirs of Burmeister, held the said legal title in trust for said heirs, and that by said conveyance the said legal title passed to the wards of plaintiff. Verdict and judgment for plaintiff. Defendant appealed.

WOODWARD, J.¹⁸ * * * These facts and allegations constitute the cause which we are to decide. And the facts may be thus briefly stated. Burmeister, in his lifetime, contracted for the lot four, paid part of the money, and took possession. After his death, the widow paid the remainder of the money, and took a deed in her own name. She also paid \$400 for the land, and took a deed in her own name. In both cases, the money she paid was money of her husband. She then married, and afterwards declared, by deed, that she held the property in trust for the plaintiff's wards, and then conveyed it to them, her husband, La Franz, not joining in the deeds.

The defendant, her husband, now claims, that by virtue of the marriage, he has a life interest in the property, which neither her act, nor the law, can take away. He claims that at the time of the marriage, she was seised in fee of this realty, and upon the marriage, he became seised of a freehold estate, a vested estate, in the wife's land.

Has the counsel for defendant overlooked one simple, but leading question: Was she seised in her own right? He has not noticed this, but has seemed to assume, that the husband's marital right overrides this consideration, and ousts every one else, if the wife only held the legal title. But this question lies at the foundation. The husband cannot get, by the marriage, more estate, nor a better estate, than the wife had. If she had obtained it by fraud, would the marriage heal the difficulty? If she held in trust, does the marriage discharge the trust, or defeat it? If the title was defective, does the marriage perfect it? But it is said, that it is the homestead. This does not make the title better. If your title to the property is not good, your fixing the homestead there, will not mend it. You may fix your homestead on a good title, but fixing it there, will not make a good title. Thus all the rights of La Franz depend entirely upon what his wife had at the time of the marriage. Now, let us inquire, whether she did or did not hold as a trustee.

* * *

Mrs. Burmeister, then, being only a trustee, and holding the title for others, what are the rights of her husband? They cannot be greater than hers. He cannot have a more absolute estate, than that on which his own hangs. His rights are exactly measured by hers. He cannot be regarded as a bona fide purchaser for a consideration, without notice. This is not like the English cases, in which the chancellor has set aside an antenuptial conveyance of the proposed wife, as a fraud on the husband. In those cases, she is

¹⁸ Part of the opinion is omitted.

supposed to be the real and actual owner of the estate. Whether with or without notice, his rights are in that only which his wife held as her own; in other words, his rights are in her property, and not in another's. He says, that upon marriage he became seised of a freehold, was entitled to receive the rents and profits in the right of his wife, that she cannot convey without his joining her. He applies to this case, the common law doctrine concerning the husband's rights in the wife's own lands. Here is his error. * * * Judgment affirmed.

WYTHAM v. WATERHOUSE.

(Queen's Bench, 1596. 1 Cro. Eliz. 466.)

A lease for years was granted to the defendant to the use of the grantor's [grantee's?] sister, whom he afterwards should marry; and he married her accordingly, and then died. The feme takes the plaintiff to husband, and afterward she died. The defendant takes administration of the plaintiff's wife's goods. The plaintiff sued the defendant in chancery to have this term. And it was there decreed, by the advice of all the justices of England, that neither the term nor the use thereof appertained to the plaintiff.¹⁹

PALE v. MICHELL.

(In Chancery, before Lord Chancellor Cowper, 1710. 2 Eq. Cas. Abr. 138.)

A term for 99 years determinable upon three lives is assigned to A. and B. in trust for C., who married, and died. The question was, whether this trust of a term goes to the husband who survived, or to the wife's administrator?

LORD CHANCELLOR held, clearly, that the trust of a term as well as the term itself survives to the husband, and that he need not take out administration.

TUDOR v. SAMYNE.

(In Chancery, before Lord Commissioners Trevor, Rawlinson, Hutchins, 1692. 2 Vern. 270.)

Dr. Sermon, the defendant's first husband, being possessed for the residue of a term of thirty-one years, granted by Dr. Lamplugh, in the year 1676, conveyed it over to trustees for the separate use and benefit of the defendant his wife. She marries Samyne a sec-

¹⁹ Witham's Case, 4 Inst. 87 (1590).

ond husband, who first mortgages this term to Venner, and he and Venner assign to the plaintiff.

The bill was against the wife and her trustees, to compel them to assign over the legal estate to the plaintiff. And decreed accordingly; for as the husband may dispose of a term for years, where the legal estate was in his wife; so he may of the trust of a term, without either the wife or the trustees joining; and Sir Edward Turner's Case [1 Vern. 7] cited, that a term assigned by the first husband for the separate use of the wife, may be sold or disposed of by the second husband.

HORNSBY v. LEE et al.

(In Chancery, before the Vice Chancellor, Sir Thomas Plumer, 1816. 2 Madd. 16.)

By indenture, 1st January, 1774, between Deacon and Collier, assignees of Baptist Darwin, a bankrupt (the father of the plaintiff), of the first part; the said Baptist Darwin and S. Darwin, his wife (the mother of the plaintiff), of the second part; and Mary Petty, R. Petty, J. Elliott, and G. Hooper, of the third part; Deacon and Collier granted etc. unto the said M. Petty, R. Petty, J. Elliott and G. Hooper, £422. 6s. 3d., four per cents, together with the dividends, to hold the same upon trust, to apply the dividends for the separate use of S. Darwin during her life, and, after her death, to apply the principal and dividends among all and every child and children of the said B. Darwin, by the said S. Darwin, as should be then living, in equal shares, payable at twenty-one; but if either of the children should die before his or their shares should become payable, the shares of him, her or them so dying, to be paid to the survivors; and if only one child who should live to attain twenty-one, then the principal sum and the dividends to be paid to such only child. By the same indenture, Deacon and Collier granted etc. to the said M. Petty, R. Petty, J. Elliott, and G. Hooper, certain shares in a messuage, and all the assignees' right, title, and interest in and to the real estate late of Richard Petty (the father of the said S. Darwin), and the moiety, or half part of the share and proportion of them the said assignees, of, in and to a certain sum of £2,762. 11s. 3d. upon the same trusts as were declared respecting the £422. 6s. 3d. four per cents.

The plaintiff and Anne Mary Darwin were the only issue of Baptist and Sarah Darwin. Baptist Darwin died in 1782. In 1787 the plaintiff married Nathaniel Hornsby, without a settlement, and in February, 1799, the plaintiff and her husband assigned over a moiety of their interest in the said trust funds upon the contingency of the plaintiff surviving her mother, unto the defendant, John Parker, as a collateral security for the due payment of an annuity of

£30. granted by the plaintiff's husband, Hornsby, to Parker during his life, in consideration of £200. paid to Hornsby.

In 1790 Anne Mary Darwin married John Patten.

In 1801 Thomas Rolph and the defendant, George Lee, were appointed trustees, and the trust monies, which then consisted of £1,453. 15s. 6d. three per cents were transferred to them.

Anne Mary Patten died in 1807, and Sarah Darwin (the mother) died early in February, 1814.

The plaintiff's husband, Hornsby, was confined in the King's Bench Prison for debt, and in January, 1814, was discharged under the insolvent act, and his estate and effects vested in a clerk of the peace, and the same were by him assigned to the defendant John Seton.

Hornsby afterwards, 16th February, 1814, died without having instituted any proceedings, or done any act to reduce the trust fund into possession in the short interval, a few days only, between the widow's death and his own.

Thomas Rolph died 24th March, 1814.

The bill, stating these facts, prayed that the trust funds, with the dividends, might be transferred to the plaintiff; or, if the court should be of opinion that the defendants Parker and Seton, or either of them, were entitled to them, then that the plaintiff might be decreed to have a settlement out of the same.

The defendant Parker, by his answer, insisted, that the dividends and interest of the moiety of the trust monies assigned to him, ought to be applied pursuant to the trusts declared as to the same, in and by the indenture of the 26th February, 1799; and stated, that £314. 3s. 6d. was due to him for ten years and a half arrears of the annuity, and claimed to be paid the same out of the trust monies.

The defendant Seton, by his answer, submitted, that the trust funds ought to be transferred to him as the assignee of the estate and effects of Hornsby, for the benefit of himself and the rest of the creditors.

The defendant Lee, the trustee, submitted to act as the court should direct.

THE VICE CHANCELLOR. Independently of authority, let us consider, upon principle, whether the husband's assignment of his wife's contingent interest is good? The husband has a right to his wife's choses in action, provided he reduces them into possession. Is a deed, assigning a reversionary interest, a reduction into possession? It is impossible actually to reduce a reversionary interest into possession. Is it then a constructive reduction into possession? The assignment puts the assignee of the husband in the same situation as the husband; and if the husband survives the wife, the assignee is entitled to the property; but here the husband died before the wife, and the assignee therefore is not entitled to the property. This is the manner in which this case strikes me, upon principle.

According to *Mitford v. Mitford* [9 Ves. Jr. 87] it is clear that the general assignment in bankruptcy does not pass a reversionary interest in the wife, she surviving her husband. It must be the same as to the assignment under the insolvent debtors act; nor do I see what answer can be given to the observation of Mr. Cooke, that a particular assignee cannot be in a better situation than an assignee under the general assignment in bankruptcy. The case cited of *Woollands v. Crowcher* [12 Ves. Jr. 174] is strong to show the insufficiency of the assignment to bar the wife's claim in case she survives her husband. On principle and authority, the plaintiff is entitled to this money.

BRADLEY v. HUGHES.

(In Chancery, before Vice Chancellor Shadwell, 1836. 8 Sim. 149.)

By the settlement on the marriage of Moses Lemon with Maria Solomon, the lady's father conveyed lands in Lancashire, to trustees, for a term of 1,000 years in trust, yearly, during the life of Maria Solomon, to raise £200., and to pay the same, by equal half-yearly payments, on the 1st of June and the 1st of January, the first payment to be made on such of the said days as should first or next happen after the solemnization of the marriage, unto such person or persons, and for such intents and purposes only as Maria Solomon, by any writing or writings under her hand, from time to time, notwithstanding her coverture, should direct or appoint, and, in default of such appointment, to pay the same into the hands of Maria Solomon for her sole and separate use and benefit (without the same being subject to the debts, contracts, engagements, intermeddling or control of Moses Lemon); and the receipt and receipts in writing of Maria Solomon, and of such person or persons as she should, from time to time, appoint to receive all or any part of the said annual sum, should from time to time, notwithstanding her coverture, be good and effectual releases and discharges for such sums of money, as, in such receipts and discharges, should be expressed to be received.

The marriage took effect: and, afterwards, Moses Lemon died. His widow then married J. B. Bradley, who, subsequently, took the benefit of the insolvent debtors act.

The bill was filed by Mr. and Mrs. Bradley against the provisionally assignee of the Insolvent Debtors Court, insisting that the defendant was not entitled to any interest in the annuity, as the same was granted to Mrs. Bradley by her father, during her life, notwithstanding her coverture; and that such coverture was not intended to apply to her marriage with Lemon alone, but to any marriage she might subsequently contract, in the event of his death; and

that she was still entitled to the annuity, for her separate use during her life; or that she was at all events, entitled to some settlement or provision out of the annuity.

THE VICE CHANCELLOR. I remember when *Benson v. Benson* [6 Sim. 126] was before me I was a good deal pressed with what was supposed to have been the meaning of the judgment in *Massey v. Parker* [2 Mylne & K. 174]. But it appeared to me that I could decide the case then before me, without either adopting or controvening what was supposed to be the meaning of the Lord Chancellor in that case; and I decided on the construction of the will. The language that fell from me in *Knight v. Knight* [6 Sim. 121] was used in consequence of what was stated by the counsel for the defendant.

It is now settled, by *Woodmeston v. Walker* [2 Russ. & M. 197], *Brown v. Pocock* [6 Sim. 257], and other cases, that property may be given for the separate use of a woman during a particular coverture: but if it is meant to be given for her separate use, so as to prevent her from alienating it, she may, before her marriage and if she be adult, dispose of it. But if she be covert, then it will operate as a restriction on her alienating it during that coverture, but not afterwards.

The other question is whether, by the death of the first husband, the lady did not become entitled to the annuity of £200. for her own use. And it appears to me that there is nothing, in the words of this settlement, which restrains her from alienating the annuity. After the death of the first husband, it is a trust for her, and then the marital right of her second husband intervenes, and, therefore, the assignee of that husband is entitled to the annuity.

I can conceive that words might be used which would, of necessity, prevent the second husband from having any right to his wife's property, as for instance, if the fund were given over in the event of payment not being made into the hands of the woman. In that case either she must take the fund, or it would go over. The words in this case are words by virtue of which this lady, during her coverture with Lemon, had the annuity for her separate use, and, after his death, it was held in trust for her.

Declare that the assignee is entitled to the annuity, subject to the wife's equitable right to have a provision made out of it for her maintenance.

SECTION 6.—BY BANKRUPTCY.

I. BANKRUPTCY OF THE TRUSTEE.

Ex parte GENNYS.

In re ELFORD.

(In Bankruptcy, before Vice Chancellor Shadwell, 1829. 1 Mont. & M. 258.)

This petition prayed that the assignees might be directed to join in conveyances to the purchasers of certain estates, of which the bankrupt was seised as trustee for the vendor.

THE VICE CHANCELLOR. I never before knew that under this clause [6 Geo. IV, c. 16, § 79] it had been contended that a mere trust estate becomes vested in the assignees; and if my opinion be now required, I have no hesitation in stating, that according to my view of the law, both before and since the late act, an estate of which a bankrupt is seised as a bare trustee does not pass to his assignees. No case had been made out which calls upon the court to interfere. If it had been suggested that the bankrupt had any interest in the property, then the assignees might be necessary parties: but according to what appears at present, the petition was not founded upon any reasonable doubt, and must be dismissed with costs.²⁰

²⁰ See *Ex parte Chion*, 3 P. Wms. 187 note A (1721).

The English bankruptcy act of 1883 (St. 46 & 47 Vict. c. 52, § 44) excludes from property of the bankrupt divisible amongst his creditors, "property held by the bankrupt on trust for any other person." The United States bankruptcy act (Act March 2, 1867, c. 176, § 14, 14 Stat. 522; Rev. St. § 5053) provided that no property held by the bankrupt in trust should pass by the assignment. The act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) does not repeat this provision, but would doubtless receive the same construction.

The assignees of a bankrupt executor do not take the legal title to the assets of the testator. *Ex parte Ellis*, 1 Atk. 101 (1742); *Ex parte Butler*, 1 Atk. 210 (1749); note by Lord Mansfield, 3 Burr. 1369. So the assignees of a bankrupt administrator do not take the legal title to the assets of the intestate. *Ex parte Marsh*, 1 Atk. 158 (1744).

If the bankrupt, holding the legal title, has a share in the beneficial interest, the legal title, it seems, will pass to the assignee in bankruptcy. *Carvalho v. Burn*, 4 Barn. & Adol. 382 (1833); *Swepson v. Rouse*, 65 N. C. 34, 6 Am. Rep. 735 (1871). This rule does not hold when the bankrupt is an express trustee. *Webster v. Scales*, 4 Doug. 7 (1784).

It need hardly be added that assignees in bankruptcy, assignees in insolvency, and assignees for the benefit of creditors are not purchasers for value, and, therefore, take the title to the assigned property subject to all the equities to which it was subject in the hands of the bankrupt, the insolvent, and the assignor, respectively.

Trust property in possession of a bankrupt trustee does not pass to his assignee under the English bankruptcy act as property left in the order and

II. BANKRUPTCY OF THE CESTUI QUE TRUST.²¹

JACKSON v. HOBHOUSE et al.

(In Chancery, before Lord Chancellor Eldon, 1817. 2 Mer. 483.)

The defendant Mary Cox being entitled to the sum of £6,000. under the will of Samuel Neate (her late husband), of which will the defendants Hobhouse, Moggridge, and Perkins were executors, by a settlement made subsequent to her marriage with the defendant George Cox, this sum was assigned to the executors, upon trust to permit the wife to receive the interest during her life to her separate use, and after her death, in case her husband should survive her, upon trust to pay the same to him during his life, and after the decease of the survivor in trust for the children of the marriage, and in case there should be no children, then for the survivor, his or her executors, etc. The settlement contained a proviso against the wife assigning or otherwise disposing of the interest of the said sum in any mode of anticipation.

Cox and his wife being afterwards desirous to raise money by way of annuity, and the defendant Leeke having agreed to purchase of them an annuity, to be secured on the £6,000. provided some person to be approved of by him would join with him in covenanting for the payment, they applied to the plaintiff, who agreed to join them accordingly, and by indenture dated the 29th of July, 1813, to which the plaintiff was a party, it was witnessed that, in pursuance of such agreement, and for the considerations therein mentioned, Cox and the plaintiff covenanted with Leeke for payment to him of the annuity of £153. during the joint lives of Cox and his wife and the life of the survivor, Mary Cox, the wife, appointing that the defendants (the trustees in the settlement) should pay and apply the yearly interest of the £6,000. during her life to Leeke, upon the trusts thereafter mentioned. And Cox and his wife thereby bargained and sold to Leeke the said yearly interest during their respective lives, and the principal sum to which the survivor would be entitled in the event of there being no issue of the marriage; upon trust, in the first place, to pay himself (Leeke) the said annuity, and subject thereto upon the trusts of the settlement.

disposition of the bankrupt by the consent of the true owner. *Copeman v. Gallant*, 1 P. Wms. 314 (1716); *Great Eastern Ry. Co. v. Turner*, L. R. 8 Ch. App. 149 (1871).

²¹ The cases in this subdivision will not be confined to bankruptcy, but will include cases involving the rights of creditors proceeding by bills for equitable execution and cases dealing with the cestui que trust's right voluntarily to alienate, as one principle pervades all.

Notice of this assignment was given to the executors, and the annuity was paid up to the 29th of October, 1813, only, since which time no further payments were made, and the defendant Leeke brought his action against the plaintiff upon the covenant, and recovered against him the sum of £356. for arrears of the annuity and costs.

The plaintiff by his bill representing that the proviso in the settlement against assigning by way of anticipation had been concealed from his knowledge previous to his becoming a party to the deed of assignment (he having been induced to enter into the covenant therein contained by an opinion of counsel taken upon an abstract in which no mention was made of the proviso, and the deed of assignment itself omitting to state it); moreover charging the defendant Mrs. Cox with being privy to such fraudulent misrepresentation and concealment; prayed an account of what had accrued due on the £6,000. since the date of the indenture of the 29th of July, 1813, and that the defendant Cox and his wife, (who were out of the jurisdiction,) and the executors, might be compelled to pay to the plaintiff the £356. so recovered against him in said action, and to pay to the defendant Leeke the residue of the interest of the £6,000. upon the trusts of the indenture, and an injunction to restrain the defendants (the executors) from parting with, or in any manner disposing of, the said principal sum of £6,000., or the interest thereof, and from making any payment on account thereof to the defendants Cox and his wife, or to any person for their use.

The injunction was obtained upon an affidavit verifying the principal allegations in the bill, but not to the extent of charging Mrs. Cox as a party to the fraud committed; and the charge was positively and expressly denied by her answer which came in afterwards. A motion was now made, on behalf of Mrs. Cox, to dissolve the injunction.

THE LORD CHANCELLOR.²² For many years after I entered into the profession, no such thing was known as a clause of restraint upon alienation of a wife's separate property by way of anticipation. The terms of the power in *Hulme v. Tenant* [1 Bro. 16] will be remembered; and there Lord Thurlow held, that the bond being executed, the creditor was entitled to the benefit of its execution. Yet it is obvious that such a determination must defeat the intention with which the power was given. It was afterwards attempted, in cases like *Pybus v. Smith* [3 Bro. 340] to be established that the alienation must be *eo modo* with the power given; that the circumstance of a direction to pay the interest from time to time into the proper hands of a married woman was enough to prevent her from having any absolute disposing power over the property, or any part, before the time of her own proper receipt of it.

²² Part of the opinion is omitted.

But this attempt also was overruled. Lord Thurlow still continued to struggle hard that the wife might be brought into a situation consistent with the manifest intention of the settlor; but he thought the decisions too strong against it. At last, he began to alter his opinion, first, in the case of Miss Watson, where he reasoned thus: A feme covert, having power to alien, is a mere creature of equity to the extent to which the settlement constitutes her a feme sole, and no further; and he therefore thought that the court might modify the power of alienation by such a clause as that now under consideration. Lord Alvanley, who followed, thought it a valid clause [Sockett v. Wray, 4 Bro. 483], and so it has been considered ever since. It is too late now to contend against the validity of a clause in restraint of anticipation.

We come then to the question of fraud. * * * The charge of fraud is not established. * * * There is, therefore, not enough to support the injunction.

Injunction dissolved.

BARTON v. BRISCOE.

(In Chancery, before the Master of the Rolls, Sir Thomas Plumer, 1822.
Jac. 603.)

By indentures dated in August, 1811, made upon the occasion of the sale of certain estates belonging to James Barton, in which Marian Barton his wife joined for the purpose of relinquishing her right of dower, two sums of £14,000. and of £5,833. 3 per cent. consols were paid and transferred to trustees, upon trust to lay out the same in the funds, or on real or government securities, with the consent of Marian Barton, signified by some writing signed by her, notwithstanding her coverture, and from time to time, with her consent, during her life to vary the securities, and upon trust to pay the dividends, interest, and annual produce to such person or persons, and for such intents and purposes, as she should from time to time, notwithstanding her coverture, by any writing or writings signed by her with her name, in her own handwriting, appoint; but not so as to deprive herself of the intended use or benefit thereof by sale, mortgage, charge, or otherwise, in the way of anticipation; and for want of such direction, into her own proper hands for her own separate and peculiar use and benefit, independently and exclusively of the said James Barton, who was not to intermeddle therewith, nor was the same to be liable to his control, debts, or interference; and it was declared that her receipts for the dividends should, notwithstanding her coverture, be sufficient discharges; and after her death, upon trust to transfer the same to such person or persons, etc. as the said Marian Barton by her will or codicil signed by her, and attested by two witnesses, should appoint; and in de-

fault of such appointment, to transfer the same to Marian Millicent Barton, the only child of the said Marian Barton and her husband, for her own use and benefit.

James Barton had since died. Marian Millicent Barton had attained twenty-one. The bill was filed by her and her mother Marian Barton; stating that they had the absolute interest in the funds, and were desirous that the trusts of the indentures of August, 1811, should be determined, and praying that the funds might be transferred into the sole name of Marian Barton.

THE MASTER OF THE ROLLS. The single point in this case is, whether upon the consent of the plaintiffs, the mother and daughter, a transfer of the fund comprised in the settlement can be made, the trustees requiring the sanction of the court before paying it over to purposes not strictly according to the letter of the deed. It made be urged against it, that there are words forbidding anticipation, directing that the mother shall not deprive herself of the use of the fund, and that she shall have during her whole life the power of disposing of it by will and not otherwise; and that to transfer it now would be directly contrary to these provisions. I have not been able to find any authority; and the question is, therefore, to be decided, whether a clause against anticipation, which is considered an obligatory and valid mode of preventing a married woman from depriving herself of the benefit of property settled (for it is too late to argue that now), becomes of no effect by the coverture being determined, and the parties interested consenting to a transfer.

In the case of a male, a similar attempt to restrain alienation would be of no effect; that was decided in *Brandon v. Robinson* [18 Ves. Jr. 429], where the words were nearly the same as here. The testator directed the interest to be paid to his son for life, and that he should not have power to anticipate the growing payments; but the Lord Chancellor was of opinion, that the son taking a life interest, it followed as an incident, that he had an uncontrolled power of disposition over it, unless it was given over upon alienation, or upon an attempt to alienate. In this case there is no gift over, no other person having any interest; the equitable interest is absolute in the plaintiffs. It is not distinguishable from *Brandon v. Robinson*, except by the sex and coverture; and it cannot be said that the law will permit restraints upon the rights of property in the case of females which it will not permit in the case of males. It is, however, to be considered, that this is a case of separate property; and that restraints may be imposed on the alienation of separate property is now settled, more upon authority than principle, beginning with what was done by Lord Thurlow in the case of *Miss Watson's settlement*. At that time, however, there was considerable doubt about it; for if a feme covert is permitted to hold separate

property in the same manner as if she were a feme sole, it would seem that it ought in equity to have those incidents which all other property has. It is difficult to conceive how they can be taken away from it, particularly when it is remembered, that the protection which courts of equity afford to married women with respect to their property not in settlement, they may if they please give up. Why, then, should a larger protection be extended as to that over which a power of disposition is given them? It is, however, too late to doubt the validity of these restraints: the question is, whether they must not be confined to the coverture. The power over separate property being a creature of equity, it is said that equity may modify that power; that reasoning, however, only applies during the coverture; when the married woman becomes discover, she has the same power over her property as other persons. The restraint, therefore, ought not to continue. The attempt to impose upon the power of alienation a fetter unknown to the common law of England may be permitted to the extent to which that power is created by equity, but not further; when the coverture is gone, the reason on which the restraint is founded no longer exists.

Supposing that to be so generally, is it not pretty plain that it was in this case the intent of the parties so to confine the clause? The object was to exclude the power of the husband; her receipts are, therefore, to be discharges during the coverture; it is not to be liable to his debts; and it seems as if all the anxiety was to protect her from his control, which, by her having survived him, is now at an end.

Another point to be considered is with respect to the power the settlement gives to the mother of disposing of these funds by will. The question is, whether she can now deprive herself of it, and abdicate it. Now the case of *Smith v. Death* [5 Madd. 371], and others of that kind, have decided that a power of this description may be parted with; and there is, therefore, I apprehend, nothing to prevent her from now releasing it, and thereby precluding herself from the exercise of it.

TULLETT v. ARMSTRONG.

(In Chancery, before Lord Chancellor Cottenham, 1840. 4 Mylne & C. 377.)

Nathaniel Bradford, by his will, dated the 27th of March, 1820, gave, devised, and bequeathed unto his daughter, Ann Bradford, and William Gates, and their respective heirs, executors, administrators, and assigns, all and every his freehold, copyhold, and leasehold estates, and all his personal estate; to hold the same unto the said Ann Bradford and William Gates, their heirs, executors, administrators and

assigns respectively, according to the nature thereof, upon trust, to stand seized and possessed of the same respectively, during the life of the testator's wife, Ann Bradford, in trust for her; and from and immediately after her decease, upon trust for—and the said testator thereby gave and devised unto his said daughter, Ann Bradford, amongst other things, his freehold messuage or tenement, and the hereditaments and premises, situated in Church street, Brighton; to hold the same, with the appurtenances, unto his said daughter Ann Bradford, and her heirs and assigns. And from and immediately after the decease of the said testator's said wife, upon trust for—and he thereby gave and devised unto and equally between his daughter, Ann Bradford, and his granddaughters Georgianna Pierpont and the defendant Mrs. Armstrong, by her then name of Mary Augusta Tilt, a copyhold messuage and premises, situate in Brighton Place; to hold the same copyhold premises, and the appurtenances, unto and equally between his said daughter, Ann Bradford, and his said granddaughters Georgianna Pierpont and Mary Augusta Tilt, during their joint and several lives, as tenants in common; and in such manner, that neither his said daughter, nor his granddaughter, should anticipate, sell, assign, or dispose of their several and respective life estates, so devised to them in the said copyhold premises and the rents and produce thereof; and so and in such manner, that neither any husband or husbands of his said daughter or granddaughters, should have or acquire any right in, or control over, the life estates or interest of his said daughter or granddaughters respectively; nor should the same be liable to the debts, control, forfeiture, or engagements of any such husband; and from and immediately after the decease of the survivor of them, his said daughter and granddaughters, upon the trusts therein mentioned. And from and immediately after the decease of his said wife, upon trust for—and the said testator thereby gave, devised and bequeathed unto the said Mary Augusta Tilt, one undivided moiety of a copyhold messuage or tenement, hereditaments, and premises in East street, Brighton; and also the entirety of a leasehold coach-house and stable on the west side of Jubilee street, then in the occupation of Patrick Conolly, or his under tenants, erected on a part or piece of land holden by the said testator, under lease from John Paine, for a term of ninety-nine years, as therein mentioned; and also a piece or parcel of leasehold land then used as a garden, and in the said testator's own occupation, situate on the north side of Jubilee street aforesaid, adjoining to the said coach-house and stable, and being other part of the ground holden by the said testator, under lease from John Paine; to hold the same last-mentioned premises, with the appurtenances, to and to the use of the said Mary Augusta Tilt and her assigns, during her life, subject as therein mentioned, and with such limitations or remainders over as therein mentioned; and after some

other bequests, the said testator directed and declared it to be his will and intention, that the devises and bequests thereinbefore made by him to his granddaughters, Georgianna Pierpont and Mary Augusta Tilt, were so given and devised to them free, exonerated from, and not subject to the rights, control, interference, debts, contracts and engagements of any husband; and were to be taken and received by the said Georgianna Pierpont and Mary Augusta Tilt, as if they were sole and unmarried; and so to be holden and enjoyed by them respectively.

The testator died in 1820, leaving his wife Ann Bradford, his daughter Ann Bradford, and his granddaughter Mary Augusta Tilt, who was then unmarried, him surviving.

On the 25th of August, 1826, Ann Bradford the daughter, made her will, and thereby, inter alia, gave and devised unto Nathaniel Bradford and Nenyon Masters Bradford, therein described, from and after the decease of the said testatrix's mother, Ann Bradford, all that the said testatrix's messuage or tenement and premises, situate in Church street, Brighton, aforesaid; to hold the same unto the said Nathaniel Bradford and N. M. Bradford, their heirs and assigns, upon trust, that they her said trustees, or the survivor of them, or his heirs, should receive and take the rents, issues, and profits thereof, and pay the same unto her niece, the said Mary Augusta Tilt, during her natural life, so and in such manner, as that the said Mary Augusta Tilt should not sell or dispose of her life interest therein, or any part thereof, or lease or borrow money thereon, by anticipation, mortgage, or otherwise; and so and in such manner as that the rents, issues and profits thereof should not be subject to the right, control, or interference of any husband whom the said Mary Augusta Tilt might marry; nor be liable to his debts, contracts, forfeitures, or engagements; and the said testatrix declared, that the receipt or receipts of her said niece only, should be a good and sufficient discharge and discharges to her said trustees or trustee, for the time being, for such rents and profits, or for so much thereof as should in such receipts be expressed to have been received; and that any sale or disposition for raising money by mortgage or otherwise, of or upon her said niece's life interest, should be from time to time null and void; and from and immediately after the decease of the said Mary Augusta Tilt, upon trust for the children of the said Mary Augusta Tilt, in the manner and for the estate therein mentioned.

After the date of the will, and on the 23d of April, 1827, the legatee, Mary Augusta Tilt, married the defendant, William Armstrong; and two days afterwards, on the 25th of April, the testatrix made a codicil to her will, and thereby varied one devise in her will, but in other respects confirmed the same; and she died in 1827.

The widow of Nathaniel Bradford, the first testator, died in Janu-

ary, 1830; and then the gifts to Mary Augusta Tilt, under the wills, took effect in possession.

By an indenture dated the 20th of March, 1832, and made between William Armstrong and Mary Augusta, his wife, of the one part, and the plaintiff of the other part, after reciting the wills of Nathan Bradford and Ann Bradford, in consideration of £300., paid by the plaintiff to William Armstrong, they the said William Armstrong and Mary Augusta, his wife, granted to the plaintiff, an annuity of £17s. during the life of Mary Augusta Armstrong; and Mary Augusta Armstrong, in exercise of the powers, etc., given to her by the will of Nathaniel Bradford and Ann Bradford, appointed the copyhold messuage in Brighton Place, and also her moiety of the copyhold messuage in East street, and the leasehold house in Jubilee street, and the freehold in Church street, unto the plaintiff, during the life of Mary Ann Armstrong, upon certain trusts, for securing the above mentioned annuity; and William Armstrong thereby covenanted that he and his wife would surrender the copyholds upon the trusts aforesaid.

A similar deed was executed in September, 1832, to secure to the plaintiff a further annuity. In January, 1835, William Armstrong took the benefit of the insolvent debtors act, and the annuities being unpaid, the plaintiff filed his bill to obtain payment thereof, out of the properties devised and bequeathed by the wills of Mr. and Mrs. Bradford.

At the hearing the Master of the Rolls, Lord Langdale made a decree for the plaintiff and the defendants appealed.

THE LORD CHANCELLOR.²³ The question raised in this case is as to the clause against anticipation; but I agree with the Master of the Rolls in thinking, not only that it necessarily involves the question of a separate estate, which has been the subject of much discussion in the legal profession, but that these two questions are identical as to the principle which must regulate the decision upon them; by which I mean that if the case be of a separate estate without power of anticipation it must exist with that qualification or fetter, if it exist at all, and that there is no principle upon which it can be held that the separate estate operates during a coverture subsequent to the gift, but that the provision against anticipation, with which the gift was qualified, does not. It is obvious that such a rule would, in practice, defeat the intention of the donor, and in many cases render the provision which he had made for the protection of the object of his bounty the means and instrument of depriving her of it.

When once it was established that the separate estate of a married woman was to be so far enjoyed by her as a feme sole, as

²³ The statement of facts is taken from 1 Beavan, 1. A portion of the opinion is omitted.

bring with it all the incidents of property, and that she might therefore dispose of it as a feme sole might do, it was found that, to secure to her the desired protection against the marital rights, it was necessary to qualify and fetter the gift of the separate estate by prohibiting anticipation. The power to do this was established by authority, not now to be questioned, but which could only have been founded upon the power of this court to model and qualify an interest in property which it had itself created, without regard to those rules which the law has established for regulating the enjoyment of property in other cases.

If any rule, therefore, were now to be adopted, by which the separate estate should, in any cases, be divested of the protection of the clause against anticipation, it would, in such cases, defeat the object of the power so assumed.

A feme covert, with separate estate, not protected by a clause against anticipation, is, in most cases, in a less secure situation than if the property had been held for her simply upon trust. In the latter case, this court, with the assistance of her trustees, can effectually protect her; in the other, her sole dependence must be upon her husband not exercising that influence or control, which, if exercised, would, in all probability, procure the destruction of her separate estate. In the case of a gift of separate estate with a clause against anticipation, the author of the gift supposes that he has effectually protected the wife against such influence or control. Upon what principle can it be that this court should subject her to it, and by so doing defeat his purpose and completely alter the character and security of his gift? The separate estate and the prohibition of anticipation are equally creatures of equity, and equally inconsistent with the ordinary rules of property. The one is only a restriction and qualification of the other. The two must stand or fall together. Indeed, I do not find any allusion, in any case, to the possibility of the one surviving the other, until after the discussion as to the continuing of the separate estate through a subsequent coverture had commenced. In the consideration of the cases upon which I am about to enter, I shall assume that there is no ground whatever for the attempt which has been made in argument to separate the two. Every authority, therefore, which bears upon the one, will bear equally upon the other.

In a case of so much importance, and which has excited so much interest, I have thought it my duty not only to consider every case which has been referred to in argument, but to endeavor to obtain all other information which was within my reach. I will first examine the cases which are supposed to support the proposition, that the absolute interest of the woman which she unquestionably possesses in property given for her separate use, though with a

prohibition against anticipation, up to the moment of her subsequent marriage, becomes subject to all the qualifications and restrictions of the gift, upon such marriage.

[Here follows a detailed discussion of the cases.]

Such is the state of the authorities upon this very important question. It is said to have been very generally understood in the profession that the separate estate would continue to operate during a subsequent coverture, and that conveyancers have acted so extensively upon that supposition, that very many families are interested in the decision of this question. That circumstance ought to have very great attention paid to it. For the future it would not probably be found difficult to obtain the desired security for the future wife by other means, consistent with the well-established rules of property; but the existing arrangements must depend upon the decision of this case.

I have over and over again considered this subject, with a great anxiety to find some principle of property consistent with the existing decisions, upon which the preservation of the separate estate during a subsequent coverture could be supported. I have been anxious to find means of preserving it, not only to maintain those existing arrangements which have proceeded upon the ground of its validity, but because I think it desirable that the rule should, if possible, be established for the future, believing, as I do, that when a marriage takes place, the wife having property settled to her separate use, all the parties in general suppose that it will so continue during the coverture. To permit the husband, therefore, to break through such a settlement, and himself to receive the fund, would, in general, be contrary to the intention of the parties, and unjust towards the wife. This view of the case has led to a suggestion which has often been made in argument, by which the object might be obtained without violating any rule of property, namely, by supposing the husband, marrying a woman with a property so settled, tacitly to assent to such settlement, or at least to be bound by an equity not to dispute it. I was for some time much disposed to adopt this view of the subject; and in all cases in which the husband was cognizant of the fact, there would be much of equitable principle to support the gift or settlement against him; by putting the title of the wife upon such assent of the husband assumes that, but for such assent, it would not exist. It abandons the idea of the old separate estate continuing through the subsequent coverture, and supposes a new separate estate to arise from the act of the husband. If the title of the wife were to rest upon that supposition, I fear that the remedy would be very inadequate, and that question would constantly arise as to how far the circumstances of each case would afford evidence of assent, or raise this equity against the husband.

After the most anxious consideration, I have come to the conclusion that the jurisdiction which this court has assumed in similar cases, justifies it in extending it to the protection of the separate estate, with its qualification and restrictions attached to it, throughout a subsequent coverture; and resting such jurisdiction upon the broadest foundation, and that the interests of society require that this should be done. When this court first established the separate estate, it violated the laws of property as between husband and wife; but it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy separate estate as a feme sole, the laws of property attached to this new estate; and it was found, as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and by another violation of the laws of property supported the validity of the prohibition against alienation.

In the case now under consideration, if the aftertaken husband be permitted to interfere with the property given or settled before the marriage to the separate use of the wife, much of the benefit and security of the rules which have been so established will be lost. Why then should not equity in this case also interfere; and if it cannot protect the wife consistently with the ordinary rules of property, extend its own rules with respect to the separate estate, so as to secure to her the enjoyment of that estate which has been so invented for her benefit? It is, no doubt, doing violence to the rules of property, to say that property which, being given with qualifications and restrictions which are held to be void, belonged absolutely to the woman up to the moment of her marriage, shall not be subject to the ordinary rules of law as to the interest which the husband is to take in it (and that is the sense, and the only sense, in which the expression used in *Massey v. Parker*, 2 Mylne & K. 174, 'why may she not by the act of marriage give it to her husband' is to be understood); but it is not a stronger act to prevent the husband from interfering with such property, than it was originally to establish the separate estate, or to maintain the prohibition against alienation. In doing this I feel that I have much to overcome, of which the observations thrown out by myself, in *Massey v. Parker*, is the only part of which I do not feel the important weight. I have to contend with Lord Brougham's observations in *Woodmeston v. Walker* [2 Russ. & M. 197], and the Vice Chancellor's decisions in *Newton v. Reid* [4 Sim. 141], *Brown v. Pocock* [2 Russ. & M. 210], *Malcolm v. O'Callahan* [5 L. J. N. S. 137], *Johnson v. Freeth* [5 L. J. N. S. 143], and *Davies v. Thornycroft* [6 Sim. 420], to which I have before adverted, and the doctrine now established, though denied by Sir John Leach in *Brown v. Pocock* and *Woodmeston v. Walker*, that before marriage, or after the coverture has determined by the death of the husband, the settlement

or gift to the separate use, and the prohibition against anticipation, are wholly inoperative and void.

In establishing the validity of the separate estate with its qualification, which constitutes its value, that is, the prohibition against anticipation, I am not doing more than my predecessors have done for similar purposes, and I have much satisfaction in finding myself justified, upon the grounds I have stated, in doing what in me lies to dissipate the alarm which has prevailed lest the separate estate should be held not to exist at all during the subsequent coverture, or, what would in many cases be a greater evil, that it should exist without the protection of the clause against alienation.

I therefore affirm the decree appealed from.

GRAVES v. DOLPHIN.

(In Chancery, before the Vice Chancellor, Sir John Leach, 1826. 1 Simons, 63.)

The testator, Benjamin Graves, gave his real and personal estates to trustees upon trust (amongst other things) to pay an annuity of £500. to his son John Graves, for the term of his natural life, and then proceeded thus:

"And my will further is, and I do direct and declare that the said annuity, or yearly sum of £500., by me given to my son John Graves for his life as aforesaid, is by me intended for his personal maintenance and support during the whole term of his natural life, and shall not, nor shall any part thereof, on any account or pretence whatsoever, be subject or liable to the debts, engagements, charges or incumbrances of him, my said son; but that the same shall be, for the purpose aforesaid, from time to time, as and when same shall from time to time become due and payable, be paid over into the proper hands of him, my said son, only, and not to any other person or persons whomsoever; and I do further direct that the receipt or receipts of him my said son only for such annuity shall be a good and sufficient discharge, and several good and sufficient discharges to my said trustees for the same."

John Graves having become a bankrupt, his assignees sold the annuity to the defendant Freshfield: and the question in the cause was whether the annuity past to the assignees by the assignment of the commissioners.

Mr. Hart and Mr. Wakefield, for John Graves, contended that the annuity had not past to the assignees. They relied on the direction in the will that the annuity should be from time to time paid into the proper hands of John Graves, and that his receipts should be a sufficient discharge for the same.

THE VICE CHANCELLOR. The testator might, if he had thought fit, have made the annuity determinable by the bankruptcy of his son;

but the policy of the law does not permit property to be so limited that it shall continue in the enjoyment of the bankrupt, notwithstanding his bankruptcy. Declare that the defendant Freshfield is well entitled to the annuity in question.²⁴

SMITH & SON v. TOWERS, Garnishee.

(Court of Appeals of Maryland, 1888. 69 Md. 77, 14 Atl. 497, 9 Am. St. Rep. 398.)

On the 15th of April, 1870, the appellant recovered judgment against Robert J. W. Garey and George Millington, trading as Garey & Millington, for \$1,188.51 and interest and costs. In May, 1886, Thomas F. Garey, the father of Robert J. W. Garey, died leaving a will, in which he devised certain real estate to one John Robert Fountain as trustee, in trust for the following purposes, to wit: "That he shall pay, or cause to be paid, unto my dear son, Robert J. W. Garey, as the same may accrue, the net rents, income and profits arising from said farm and property, after deducting such sums of money as may be necessary to satisfy and pay taxes and assessments levied thereon, and needful repairs to buildings and fencing, * * * the said net rents, income and profits to be paid to the said Robert J. W. Garey, (into his own hands, and not into another, whether claiming by his authority or otherwise,) so long as he, the said Robert J. W. Garey, shall live" etc.; then in trust convey to the same in fee simple to the children

²⁴ Brandon v. Robinson, 18 Ves. Jr. 429 (1811); s. c., 1 Rose, 197; Green v. Spicer, 1 Russ. & Myl. 395 (1830); s. c., Tambl. 396; Woodmeston v. Walker, 2 Russ. & Myl. 197 (1831); Jones v. Salter, 2 Russ. & Myl. 208 (1831); Brown v. Pocock, 2 Russ. & Myl. 210 (1831); Piercy v. Roberts, 1 Myl. & K. 4 (1832); Snowden v. Dales, 6 Sim. 524 (1834); Rippon v. Norton, 2 Beav. 63 (1839); Page v. Way, 3 Beav. 20 (1840); Lord v. Bunn, 2 Y. & C. C. 98 (1843); Kearsley v. Woodcock, 3 Hare, 185 (1843); Younghusband v. Gisborne, 1 Coll. 400 (1844); Rochford v. Hackman, 9 Hare, 475, 480 (1852); Wallace v. Anderson, 16 Beav. 533 (1853); Rugely v. Robinson, 10 Ala. 702 (1846); Robertson v. Johnston, 36 Ala. 197 (1860); Smith v. Moore, 37 Ala. 327 (1861); Jones v. Reese, 65 Ala. 134 (1880); Taylor v. Harwell, 65 Ala. 1 (1880); Kempton v. Hallowell, 24 Ga. 52, 71 Am. Dec. 112 (1858); Bailie v. McWhorter, 56 Ga. 183 (1876); Samuel v. Salter, 3 Metc. (Ky.) 259 (1860); Knefler v. Shreve, 78 Ky. 297 (1879); Woolley v. Preston, 82 Ky. 415 (1884); Marshall's Trustee v. Rash, 87 Ky. 116, 7 S. W. 879, 12 Am. St. Rep. 467 (1888); Bland's Adm'r v. Bland, 90 Ky. 400, 14 S. W. 423, 9 L. R. A. 599, 29 Am. St. Rep. 390 (1890); Bull v. Ky. Nat. Bk., 90 Ky. 452, 14 S. W. 425, 12 L. R. A. 37 (1890); Hallet v. Thompson, 5 Paige (N. Y.) 583 (1836); Bryan v. Knickerbacker, 1 Barb. Ch. (N. Y.) 409 (1846); Havens v. Healy, 15 Barb. (N. Y.) 296 (1853); Bramhall v. Ferris, 14 N. Y. 41, 67 Am. Dec. 113 (1856); Rome Exch. Bk. v. Eames, 4 Abb. Dec. (N. Y.) 83, 99 (1864); Dick v. Pitchford, 21 N. C. 480 (1837); Bank v. Foreney, 37 N. C. 181, 184 (1842); Mebane v. Mebane, 39 N. C. 131, 44 Am. Dec. 102 (1845); Pace v. Pace, 73 N. C. 119 (1875); Wallace v. Smith, 2 Handy (Ohio) 79 (1855); Hobbs v. Smith, 15 Ohio St. 419 (1864); Stanley v. Thornton, 7 Ohio Cir. Ct. 455 (1893); Tillinghast v. Bradford, 5 R. I. 205 (1858); Jastram v. McAuslan, 26 R. I. 320, 58 Atl. 952 (1904); Heath v. Bishop, 4 Rich. Eq. (S. C.) 46, 55 Am. Dec. 654 (1854); Wylie v. White, 10 Rich. Eq. (S. C.) 294 (1858); Hutchinson v. Maxwell, 100 Va. 169, 40 S. E. 655, 57 L. R. A. 384, 93 Am. St. Rep. 944 (1902); Honaker Sons v. Duff, 101 Va. 675, 44 S. E. 900 (1903).

or descendants of said Robert, etc. The said Fountain, trustee, being dead, under proper proceedings had in the Circuit Court for Caroline County, in equity, William F. Towers was, by the decree of said court, appointed trustee in the place of Fountain, to take and hold said farm and property in trust, and discharge said trust; and he duly qualified as such trustee, as required by said decree. On the 8th of June, 1887, an attachment was issued by way of execution, and laid in the hands of William F. Towers, trustee, to affect funds which he held under the will of Thomas F. Garey in trust for Robert J. W. Garey, one of the judgment debtors. An agreed statement of facts was filed in the case, and it was agreed that a pro forma judgment should be entered for the defendant, with the right of appeal reserved to the plaintiff. The plaintiff accordingly took this appeal.

ROBINSON, J., delivered the opinion of the court.²⁵

The testator devised certain real estate to his friend John R. Fountain in trust to collect the rents and profits, and to pay the same to his son Robert, "into his own hands, and not into another, whether claiming by his authority, or otherwise," and upon his death to convey said real estate to such children of his son Robert as may be living at the time of his death.

Upon the construction of this clause of the testator's will two questions arise: First, did the testator mean to give the income of the property to his son to the exclusion of his creditors? and secondly, if so are the terms and provisions of the will effectual to carry out this intention? There can be no difficulty whatever as to the first point. He not only gives the legal estate to the trustee, but directs in express terms that he shall pay the income into the hands of his son and not into the hands of any other person, whether claiming by his authority, or in any other capacity. Here, then, is an express provision, that the income shall be paid to his son, and an express prohibition against paying it to any other person. If the income in the hands of the trustee is liable to the claims of creditors, the trustee it is plain could not carry out the trust. So construing this will as we do, and it is not we think susceptible of any other construction, the testator meant beyond all question that the income should be paid into the hands of his son, to the exclusion of all other persons, whether claiming as alienees or as creditors.

The next point is one of more than ordinary importance, and has not heretofore been decided by this Court. A great deal may be said on both sides, and the question is not free of difficulty. In England the decisions are all one way, and it is well settled there, that the devisee of an equitable estate or interest for life to any person, other than a married woman, carries with it, as a necessary incident to such estate or interest, the right of alienation by the cestui que trust, and is liable for the payment of his debts, and no provision by way of

²⁵ The dissenting opinion of Alvey, C. J., concurred in by Bryan, J., has been omitted because of its length. It deserves a careful examination.

inhibition or otherwise, which does not operate as a cesser or limitation over of the estate, can protect it against the claims of creditors. *Brandon v. Robinson*, 18 Ves. 429; *Rochford v. Hackman*, 9 Hare, 480; *Graves v. Dolphin*, 1 Sim. 66; *Green v. Spicer*, 1 Russ. & Myl. 395; *Younghusband v. Gisborne*, 1 Collyer, 400.

In this country, however, the decisions are conflicting, and the Supreme Court of the United States, and the Supreme Courts of other states, have, after full consideration of the English cases, held that the power of alienation is not a necessary incident to an equitable estate for life, and that the owner of the property may, in the free exercise of his bounty, so dispose of it as to secure its enjoyment to his beneficiary, without making it alienable by him, or liable in any manner for his debts, and that such an intention when clearly expressed by the founder of the trust, must be respected by the courts. The Supreme Court, after reviewing the English decisions, in an able opinion by Justice Miller, say: "But the doctrine, that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefit sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this Court. * * * Nor do we see any reason, in the recognized nature and tenure of property and its transfer by will, why a testator who gives, without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee." *Nichols, Assignee, v. Eaton et al.*, 91 U. S. 725, 727, 23 L. Ed. 254.

And in the still later case of *Broadway National Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504, argued in June, 1881, and reargued in March, 1882, the Court unanimously held that property may be conveyed in trust, with the provision that the income shall not be alienated by the beneficiary by anticipation, or be subject to be taken by his creditors in advance of its payment to him, although there is no cesser or limitation over of the estate in such an event. *Morton, C. J.*, says: "We are not able to see that it would violate any principles of sound public policy to permit a testator to give to the object of his bounty such a qualified interest in the income of a trust fund, and thus provide against the improvidence or misfortune of the beneficiary. * * * Under our system, creditors may reach all the property of the debtor not exempt by law, but they cannot enlarge the gift of the founder of a trust, and take more than he has given."

And then again in *Rife v. Geyer*, 59 Pa. 393, 98 Am. Dec. 351, Judge Sharswood speaking for the Court says: "That a benefactor has the power of thus restricting the enjoyment of his bounty through the medium of a trust during the life of the beneficiary is now the unquestionable law of this state." In *Shankland's Appeal*, 47 Pa. 113,

the point was expressly decided, and it was there held that a trust to collect and receive rents and pay over the same to a son of the testatrix for and during the term of his natural life, without being subject to his debts and liabilities was an active one, and that the legal estate was vested in the trustee, and no act of the cestui que trust could deprive him of it, or allow him to interfere with the collection of the income, and no creditor could touch the income or any interest which the cestui que trust had in it.

In Vermont, Connecticut and Kentucky, the highest courts have held that the income of property may be devised in trust for the benefit of the cestui que trust for life to the exclusion of the claims of his creditors. *Ex'rs of White v. White*, 30 Vt. 338; *Leavitt v. Beirne*, 21 Conn. 1; *Pope's Ex'rs v. Elliott*, 8 B. Mon. (Ky.) 56.

In other states, however, and it may be said in the majority of the states where the question has arisen, the English rule has been adopted without qualification. *Tillinghast v. Bradford*, 5 R. I. 205; *Dick v. Pitchford*, 21 N. C. 480; *Heath v. Bishop*, 4 Rich. Eq. (S. C.) 46, 55 Am. Dec. 654; *Bailie v. McWhorter*, 56 Ga. 183; *Rugeley and Harrison v. Robinson*, 10 Ala. 702.

In this state there is no decision to govern us, and with conflicting decisions in other Courts entitled to the highest consideration, the question is one after all to be determined by us on principle. The English decisions rest on two grounds: First, that the right of alienation is a necessary incident to an equitable estate for life, and any restraint upon this right is against the policy of the law which favors the ready alienation of property; and secondly, that public policy forbids that one should have the right to enjoy the income of property, to the exclusion of his creditors. Now the right to sell and dispose of property, is a necessary incident of course to the absolute ownership of such property. You cannot give to one a fee simple interest, and then say he shall not sell or dispose of it, because the right to alien it is a legal and necessary incident to the estate granted, and to impose such a condition would be repugnant to the nature and tenure of the estate itself. And besides the best interests of the public require that there should be a ready transmission of property. But the reasons on which the rule is founded do not apply to the transfer of property in trust.

Where by the terms of the trust the legal estate is vested in a trustee, he takes the legal title with the necessary incidents attached to it, and among such incidents is the right to alien it. The cestui que trust takes the equitable estate with the right to the accrued income, and when this has been paid to him, the absolute right to dispose of it. So neither the principal nor the income can be said to be inalienable. And besides, the policy of the law is not against all restraints on the absolute right to dispose of it. You may give an estate for life, with a provision that the estate shall go over to a third person upon alienation, voluntary or involuntary, by the life tenant. You cannot give property to be held in perpetuity, but you may give one an estate for life,

with a limitation over to lives in being, and twenty-one years thereafter. And so by the English rule you may give an equitable estate for life, with a limitation over or a cesser²⁶ to a third person, should the life tenant attempt to alien it. Now, in all these instances, there is a restraint to a greater or less degree on the right of alienation. The law does not therefore forbid all and any restraints on the right to dispose of it, but only such restraints as may be deemed against the best interests of the community. And the gift of an equitable right to the income from property for the life of the beneficiary, to the exclusion of his alienee, is not, in our opinion, repugnant to the estate or interest granted, nor is it such a restraint on the right of alienation as the law for reasons of public policy forbids.

And then as to the other ground, that it is against the policy of the law to permit one to hold and enjoy an estate or interest in property for life, whether legal or equitable, to the exclusion of his creditors. Now common honesty requires, of course, that every one should pay his debts, and the policy of the law for centuries has been to subject the property of a debtor of every kind, which he holds in his own right, to the payment of his debts. He has as owner of such property the right to dispose of it as he pleases, and his interest is, therefore, liable for the payment of his debts. But a cestui que trust does not hold the estate or interest in his own right; he has but an equitable and qualified right to the property or to its income, to be held and enjoyed by the beneficiary on certain terms and conditions prescribed by the founder of the trust. The legal title is in the trustee, and the cestui que trust derives his title to the income through the instrument by which the trust is created. The donor or deviser, as the absolute owner of the property, has the right to prescribe the terms on which his bounty shall be enjoyed, unless such terms be repugnant to the law. And it is no answer to say that the gift of an equitable right to income to the exclusion of creditors is against the policy of the law. This is begging the question. Why is it against the policy of the law? What sound principle does it violate? The creditors of the beneficiary have no right to complain, because the founder of the trust did not give his bounty to them. And if so, what grounds have they to complain because he has seen proper to give it in trust to be received by the trustee and to be paid to another, and not to be liable while in the hands of the trustee to the creditors of the cestui que trust. All deeds and wills, and other instruments by which such trusts are created, are

²⁶ Limitation over: *Yarnold v. Morehouse*, 1 R. & M. 364 (1830); *Manning v. Chambers*, 1 De G. & Sm. 282 (1847); *Rochford v. Hackman*, 9 Hare, 475 (1852); *Sharp v. Cosserat*, 20 Beav. 470 (1855); *Joel v. Mills*, 3 K. & J. 458 (1857); *Nichols v. Eaton*, 91 U. S. 716, 23 L. Ed. 254 (1875); *Bull v. Ky. Nat. Bk.*, 90 Ky. 452, 14 S. W. 425 (1890); *Bottom v. Fultz*, 124 Ky. 302, 98 S. W. 1037 (1907); *Bramhall v. Ferris*, 14 N. Y. 41, 67 Am. Dec. 113 (1856).

Cesser: *Dommett v. Bedford*, 3 Ves. Jr. 149 (1796); *Shee v. Hale*, 13 Ves. Jr. 404 (1807); *Rochford v. Hackman*, 9 Hare, 475, 480-483 (1852); *Joel v. Mills*, 3 K. & J. 458 (1857); *Hatton v. May*, L. R. 3 Ch. Div. 148 (1876); *Nichols v. Eaton*, 91 U. S. 716, 23 L. Ed. 254 (1875).

required by law to be recorded in the public offices, and creditors have notice of the terms and conditions on which the beneficiary is entitled to the income of the property. They know that the founder of the trust has declared that this income shall be paid to the object of his bounty to the exclusion of creditors, and if under such circumstances they see proper to give credit to one who has but an equitable and qualified right to the enjoyment of property, they do so with their eyes open. It cannot be said that credit was given upon such a qualified right to the enjoyment of the income of property, or that creditors have been deceived or misled; and if the beneficiary is dishonest enough not to apply the income when received by him to the payment of his debts, creditors have no right to complain because they cannot subject it in the hands of the trustee to the payment of their claims, against the express terms of the trust. The hardship to them is one that will surely bring about its own remedy, for the dishonest beneficiary it is plain would soon be without credit. And then, as to the rights of creditors, these may be defeated, even according to the English decisions, by providing that in the event of the recovery of a judgment against the cestui que trust, or upon his insolvency, his interest in the property shall cease, and shall go to another. Now what advantage to the creditor is the cesser or limitation over? What he wants is the money due to him, and this is not paid by depriving the beneficiary of the property. But it may be said that, sooner than lose his interest in the property, self-interest, if no higher consideration, will prompt him to pay his debts. There is force in this, but with the best intentions any one may, by the chances and hazards incident to every pursuit in life, be unable to pay his debts, and in that event, by depriving one of his property by limitation over to a third person, you may deprive him of the very means by which he might in the future repair his fortune. So it does not seem to us there is any substantial advantage to the creditor, in thus permitting the founder of the trust to do that indirectly, which we think he can do directly. And then again, by the English rule, the rights of creditors may be excluded by providing that the income may be paid or not to the beneficiary at the option of the trustee. To impose a requirement, so harsh in itself, upon the bounty of a donor or deviser who may desire to provide for the certain support of the object of his bounty is not warranted, it seems to us, by any principle of justice or sound public policy. And a rule of law which requires this to be done, and one which may be evaded by carefully drawn terms and provisions, is hardly worth preserving. Upon principle, therefore, we are of opinion that the founder of a trust may provide in direct terms that his property shall go to his beneficiary to the exclusion of his alienees, and to the exclusion of his creditors. This being so, the rents and profits in the hands of the trustee, and which the testator in the will before us directs shall be paid into the hands of his son, Robert, and "not into the hands of another, whether claiming by his authority or otherwise," cannot, in our

opinion, be reached by his creditors, by any process, either at law or in equity, before such rents and profits are paid to him.²⁷

Judgment affirmed.

In re NEIL.

HEMMING v. NEIL.

(In Chancery, before Kekewich, J., 1890. 62 Law Times Reports [N. S.] 649.)

Adjourned Summons.

James Neil who died in 1888, devised and bequeathed all his real and personal estate to his trustees to convert the same into money and divide the total into seven equal parts, and to stand possessed of one-seventh upon trust during the life of his son Philip to pay and apply the whole or any part of the income or accumulations of income for the support, maintenance, or education, or otherwise for the benefit of his son Philip, his wife and children, or any one or more of them, his said son, his wife and children, in such manner in all respect as his trustees should in their uncontrolled discretion think fit.

August 1, 1889, Philip Neil assigned to R. C. A. Hemming all his interest in said one-seventh to secure payment of £60., October 31,

²⁷ *Nichols v. Eaton*, 91 U. S. 716, 725-729, 23 L. Ed. 254 (1875); *Hyde v. Woods*, 94 U. S. 523, 526, 24 L. Ed. 264 (1876); *Steib v. Whitehead*, 111 Ill. 247 (1884); *Roberts v. Stevens*, 84 Me. 325, 24 Atl. 873, 17 L. R. A. 266 (1892); *Braman v. Stiles*, 2 Pick. (Mass.) 460, 463, 13 Am. Dec. 445 (1824); *Broadway Nat. Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504 (1882); *Billings v. Marsh*, 153 Mass. 311, 26 N. E. 1000, 10 L. R. A. 764, 25 Am. St. Rep. 635 (1891); *Leigh v. Harrison*, 69 Miss. 923, 11 South. 604, 18 L. R. A. 49 (1892); *Lampert v. Haydel*, 96 Mo. 439, 9 S. W. 780, 2 L. R. A. 113, 9 Am. St. Rep. 358 (1888); *Partridge v. Cavender*, 96 Mo. 452, 9 S. W. 785 (1888); *Fisher v. Taylor*, 2 Rawle (Pa.) 33 (1829); *Vaux v. Parke*, 7 Watts & S. (Pa.) 19 (1844); *Shankland's Appeal*, 47 Pa. 113 (1864); *Rife v. Geyer*, 59 Pa. 393, 98 Am. Dec. 351 (1868); *Overman's Appeal*, 88 Pa. 276 (1879); *Thackara v. Mintzer*, 100 Pa. 151 (1882); *Jourolmon v. Massengill*, 86 Tenn. 81, 5 S. W. 719 (1887); *Barnes v. Dow*, 59 Vt. 530, 10 Atl. 258 (1887).

A man cannot settle his own property in trust for his own benefit, so as to exempt the income from alienation by him or from process by his creditors. *Warner v. Rice*, 66 Md. 436, 8 Atl. 84 (1886); *Pacific National Bank v. Windram*, 133 Mass. 175 (1882); *Jackson v. Von Zedlitz*, 136 Mass. 342 (1884); *McIlvaine v. Smith*, 42 Mo. 45, 97 Am. Dec. 295 (1867); *Schenck v. Barnes*, 156 N. Y. 316, 50 N. E. 967, 41 L. R. A. 395 (1898); *Mackason's Appeal*, 42 Pa. 330, 82 Am. Dec. 517 (1862); *Ghornmley v. Smith*, 139 Pa. 584, 21 Atl. 135, 11 L. R. A. 565, 23 Am. St. Rep. 215 (1891).

In some jurisdictions, e. g., California, Illinois, Indiana, Kansas, Michigan, Minnesota, New Jersey, New York, North Dakota, South Dakota, Oklahoma, Tennessee, and Wisconsin, the rights of creditors of the cestui que trust are fixed by statutes; they being either denied all rights or limited to the surplus income that may remain after providing a suitable support for the cestui que trust. See *Cummings v. Corey*, 58 Mich. 494, 25 N. W. 481 (1885); *Hardenburgh v. Blair*, 30 N. J. Eq. 645 (1879); *Force v. Brown*, 32 N. J. Eq. 118 (1880); *Lippincott v. Evens*, 35 N. J. Eq. 553 (1882); *Linn v. Davis*, 58 N. J. Law, 29, 32 Atl. 129 (1895); *Williams v. Thorn*, 70 N. Y. 270 (1877); *Tolles v. Wood*, 99 N. Y. 616, 1 N. E. 251 (1885); *Kilroy v. Wood*, 42 Hun (N. Y.) 636 (1886).

1889, and August 14, 1889, gave said Hemming a further charge on the same to secure payment of a further sum of £60. the same day.

August 15, 1889, Hemming notified the trustees of these assignments. Notwithstanding this notice the trustees continued to pay Philip Neil weekly sums on account of the income of his share.

An originating summons was taken out by Hemming against the trustees and Philip Neil asking that certain questions be determined.

The summons was adjourned into court and now came on to be heard.

KEKEWICH, J.²⁸ * * * It appears that some moneys have been paid to or for the benefit of Philip Neil since notice of the assignment of his interest was given to the solicitors for the trustees of the will, and the plaintiff seeks to make the trustees liable in respect of the payments so made. In determining that question the word which will guide me is the word "benefit" in the direction to the trustees to pay or apply the whole or any part of the income of his share. Philip is entitled to assign nothing but his beneficial interest under the will of the testator. Money paid to him or to any person on his behalf—excluding such a special case as that put by Cotton, L. J., in *Re Coleman*; and *Henry v. Strong* (60 L. T. Rep. N. S. 127; 39 Ch. Div. 443)—is necessarily part of his beneficial interest. Mr. MacSwiney says that the money is not his until it is actually paid to him. I think that that argument is more ingenious than sound. I think that it must be assumed that money paid by the trustees to him or to any person in his behalf was his in their irrevocable determination immediately before the payment. At that period of time they had notice or were affected with notice of the assignment. I think, therefore, the trustees are liable to pay to the plaintiff all moneys which have been paid by them to Philip Neil, or to any person on his behalf, since the receipt by the trustees of the notice of the charge. * * *

In re BULLOCK.

GOOD v. LICKORISH.

(In Chancery, before Kekewich J., 1891. 64 Law Times Reports [N. S.] 736.)

Adjourned Summons.

By the will and codicil of Edwin Bullock (who died on the 14th Feb., 1870), all the real and personal estate of the testator were vested in the plaintiffs Charles Patten Good and Henry Williams, and the testator's widow, Mary Bullock, his executors and trustees, in trust for the testator's children, and the issue born in his lifetime of Mary Bullock, as she should by deed or will appoint, and, failing such appointment, and so far as the same should not extend, in trust for those

²⁸ A part of the opinion is omitted.

of his six children who should be living at her death, and the issue of such as should, be then dead leaving issue.

Mary Bullock, by her will dated the 29th May, 1883, directed and appointed as follows:

"My late husband's trustees or trustee shall stand possessed of £15,000. further part of the said net proceeds, upon trust to invest the same in some or one of the modes of investment by law authorized for the investment of trust funds, and to pay the income of such investments to the said Theodore Walter William Bullock, during his life or until he shall become a bankrupt or a liquidating debtor, or cease to be entitled to receive such income, or any part thereof, for his own personal use or benefit, by any means or for any purpose. And in the event of, and upon the said T. W. W. Bullock becoming a bankrupt or a liquidating debtor, or ceasing to be entitled to receive the said income, or any part thereof, for his own personal use or benefit, by any means or for any purpose, to pay to him or apply for his benefit, during the remainder of his life, either the whole, or so much, and so much only of the said income, as my late husband's trustees or trustee shall in their or his uncontrolled discretion think fit, and, subject to the aforesaid interest hereinbefore appointed in favor of the said T. W. W. Bullock, my late husband's trustees or trustee shall hold the said £15,000., and the investments and income (including any accumulations of income) thereof in trust for the child, if only one, or all the children equally, if more than one, born in my lifetime, of the said T. W. W. Bullock, and if there be no such child, in trust for the said William Bullock, Mary Holyoake Bullock, Constance Bullock, and Dorothy Marian Good as tenants in common in equal shares."

The testatrix died on the 29th Dec., 1886, and her will and several codicils, which did not affect the above appointment, were proved by her executors, the plaintiffs Charles Patten Good and Henry Williams, on the 15th Feb. 1887. * * *

The trustees invested the £15,000. in stock, * * * the interest on which was paid to T. W. W. Bullock up to and including the 16th July, 1890.

On the 23rd August, 1890, the trustees received notice of a memorandum of charge, dated the 30th Jan., 1889, from T. W. W. Bullock to Lickorish and Bellord, solicitors, on all his interest under the will of the testatrix to secure money of which about £500. was stated to be owing.

On the 23rd of Oct., 1890, a receiving order was made against T. W. W. Bullock, and on the 14th Nov., 1890, the trustees received notice that the official receiver claimed the £12,011. stock as trustee in the bankruptcy of T. W. W. Bullock. He subsequently claimed the proportion of interest due at the date of the receiving order; but the claims of the trustees were afterwards withdrawn.

The trustees took out an originating summons, asking (inter alia)

whether the plaintiffs properly might during the life of T. W. W. Bullock apply the whole, or any, and what part, of the income of the trust fund in providing in such manner as they might from time to time think fit for the past and future lodging, board, clothing, maintenance, and support of T. W. W. Bullock, and the payment of sundry legal expenses incurred by him or on his behalf in and since July, 1890, or how the said income ought to be dealt with by the plaintiffs.

The summons was adjourned into court, and now came on to be heard.

KEKEWICH, J. At the conclusion of the arguments on that point, I held that the particular assignee represented by Mr. Maidlow is not entitled to any part of the income in which Theodore Walter William Bullock takes an interest under the will. He only claimed that which accrued before notice of his assignment was given to the trustees of the will, and that on the ground that until such notice was given the assignment was not perfect, and Mr. Bullock could not until then be said to have ceased to be entitled to receive the income for his own personal use or benefit. I held that, although for some and important purposes, the assignment might fairly be said to be not perfect until notice given, yet as between assignor and assignee it was perfect as from its date, and operated as a cesser of the assignor's title to receive the income. I advert to this now because, with reference to the point remaining to be decided, it is important to observe that the particular assignee has no interest. It is also important to observe that the general assignee—that is, the trustee in bankruptcy—makes no claim. He has abstained from doing so deliberately, and I have no doubt wisely. He could not, as far as I can see, have put forward any tenable argument in support of a claim if made. The question is therefore raised as between Mr. Bullock and those entitled under the gift over, or, rather, such of them as claimed adversely to him, for they do not all act together or take the same view. Mr. Warmington's argument for them was that the language of the will only empowers the trustees to pay the income to Mr. Bullock or to apply it for his benefit, and that neither of these things can be done. As regards payment, reliance was placed on the decision in *Re Coleman, Henry v. Strong* (60 L. T. Rep. N. S. 127; 39 Ch. Div. 443) and my own judgment in *Re Neil, Hemming v. Neil* (62 L. T. Rep. N. S. 649), to which, on reflection I adhere; and it was said that to pay income to Mr. Bullock would be to make a payment in derogation of the over-riding title of the trustee in bankruptcy, and therefore a wrongful payment, which would be no discharge to the trustees of the will, and render them accountable to the trustee in bankruptcy. The argument is, I think, well founded.

As regards applications for the benefit of Mr. Bullock, the argument took this form. It was said that where the court has upheld a discretionary trust for applications arising on bankruptcy or the equivalent of bankruptcy, the discretion has been exercisable with reference to wife and children as well as the bankrupt, and the decisions of the

court have proceeded on the impossibility of determining beforehand what, if anything, the trustees would, in the exercise of their discretion, apply for the benefit of the bankrupt as distinguished from the other objects of their power. For this reference was made to two cases as examples of a class—*Godden v. Crowhurst* (10 Sim. 642) and *Kearsley v. Woodcock* (3 Hare, 185). The language of the judgments, and especially that of Vice Chancellor Shadwell, in *Godden v. Crowhurst*, countenances the argument; but the precise point which I have now to consider was not before the court in either case, and I cannot think that either judge intended to decide it. I can see no reason on principle for defeating the obvious intention of the testatrix. That obvious intention was to enable the trustees in the event of Mr. Bullock's bankruptcy to apply for his benefit the income, or an adequate part of the income, which he thereupon ceased to be entitled to receive. It is clear, and the trustee in bankruptcy has practically admitted, that he can take no interest in income thus applied; and it is difficult to see how those entitled under the gift over can successfully claim as coming to them what, if it does not come to them, would not go to the trustee in bankruptcy.

The argument in opposition to their claim is strongly supported by *Chambers v. Smith* (3 App. Cas. 795). It is a Scotch case, but the Scotch law was expressly stated to be on this point in no way different from that of England. It was there held that trustees possessing a discretionary power, such as the trustees of this will possess, might exercise it in favor of the beneficiaries occupying Mr. Bullock's position, notwithstanding arrestment by judgment creditors. The law is expounded by the several learned Lords who gave their opinions to the House, but it will suffice to refer to those of Lord Chancellor Hatherley and Lord Blackburn. There is a passage in the Lord Chancellor's judgment (on page 804) which seems to me directly applicable to the case in hand. It may be thus applied: Mr. Bullock has no control over the fund when the trustees resolve to exercise their discretionary power. He cannot, and no one claiming through him can, make a claim against the trustees for payment. It would be a sufficient answer to any such claim to say, "We have postponed such payment to you personally, and intend ourselves to apply the money for your behoof." And on page 807 he says: "If I am correct in holding as I do that the trust powers could not be destroyed by the objects of them becoming indebted, which, indeed, seems the time at which the testator would have desired them to be brought into action, then the trustees are not innovating, but only exercising their rights as conferred upon them by their trustee at their own discretion." On page 817 Lord Blackburn notices the great and fundamental difference between a gift to one either direct or through the medium of trustees, who are mere conduit pipes to convey the gift to the beneficiary, and a gift subject to a power reserved to trustees to be exercised paramount to the beneficiary and in his despite, and adds: "I think the arrestment fixes the date at which

it is to be determined whether the arresters have a right to attach the fund, and anything that is subsequently done by the debtor or by those who have rights against the debtor, or by those who claim under him, comes too late after that." In other words, the assignment in this case, which is equivalent to the arrestment in the case before the House of Lords, called the discretionary power of the trustees into operation, and it would be a contradiction to hold that the power is inoperative just when it was intended to be exercised. What the trustees in the exercise of their discretion do not from time to time think fit to apply for the benefit of Mr. Bullock goes by the words of the will to those entitled under the gift over; but they take only this overplus, and cannot claim what the trustees determine to apply.

I was asked by the trustees to define the limits within which they may apply the income for Mr. Bullock's benefit. I find it extremely difficult to do this in the abstract, and I am unwilling to fetter the trustees' discretion, which was intended to be and ought to be construed as large. I could not refuse to determine any particular question submitted by them to the court, and, if any real difficulty occurs, they would probably be justified in asking the court's protection. I can say no more at present than that they certainly may, in my opinion, spend the whole or any part of the income in maintenance, using that word in its most general and widest sense; and I doubt whether I was right in saying in the course of the argument that they could not properly pay Mr. Bullock's debts. The discretion is vested in them, and though, as already mentioned, they are entitled to the assistance of the court if a case of real difficulty occurs, they must exercise it, and so long as they exercise it honestly—that is, as men of ordinary business habits and prudence, and with due regard to all the circumstances of the case—the court will not interfere with them.²⁹

SECTION 7.—BY ACT OF CREDITORS.

I. CREDITORS OF TRUSTEE.

STITH v. LOOKABILL.

(Supreme Court of North Carolina, 1874. 71 N. C. 25.)

Civil Action, to recover possession of certain real estate tried at the Spring Term, 1874, of the Superior Court of Davidson County, before His Honor, Judge Cloud.

The plaintiff showed title from the state to one J. M. Lisle; then a deed from Lisle to F. M. Camman; then an original attachment

²⁹ See Gray, *Restraints on the Alienation of Property* (2d Ed.) 167f-167j. See, also, *Nichols v. Eaton*, 91 U. S. 716, 23 L. Ed. 254 (1875).

against Camman, which was duly levied on the premises, and after proper proceedings had thereon, a final judgment in said attachment, and a ven. ex. issued to sell the land. Plaintiff further showed a sale and that A. B. Stith became the purchaser, who, dying pendente lite, willed the same to the plaintiff; also, that the defendant was in possession.

Here, the plaintiff resting his case, the defendant moved the Court to non-suit the plaintiff, on the ground that Camman did not acquire such an interest as was the subject of attachment, levy and sale under execution, the defendant stating that if His Honor should overrule the motion he had evidence to offer showing title in himself.

His Honor sustained the motion and non-suited the plaintiff. From this judgment the plaintiff appealed.

The provisions of the deed to Camman are sufficiently set forth in the opinion of the Chief Justice.

PEARSON, C. J.³⁰ Upon the motion to non-suit, the only question was, "Had Camman such an estate as was subject to sale under execution by his creditors?" On this depended the right of the plaintiff, who was the purchaser, to maintain an action against the defendant, who for the purposes of the motion, stands as a wrong-doer, without connection, either as assignee or agent, with the cestui que trusts for whom Camman is assumed to have held the legal estate.

Mr. Gilmer in a well-considered argument admitted the general positions taken by Mr. Bailey, in respect to "uses and trusts," to wit:

1. This case did not come within the operation of Stat. 27 Henry VIII. So the legal title was in Camman subject to the trust, set out in the deed, "for the sole and exclusive benefit of the members of a company called and known as 'The Conrad Hill Gold and Copper Company,' their successors and assigns forever.

2. Camman, in the courts of law, was considered to be the owner of the land, and no notice was taken of the trust, to which he was subject.

3. Camman had power to assign the legal estate, and it could be sold under an execution against him, the purchaser taking subject to the trust, and notice being presumed.

4. Under the old system the plaintiff would have been entitled to judgment on a demurrer to the evidence.

Mr. Gilmer then "proved by the books" that although the plaintiff was in a court of law (under the old system) treated as the absolute owner of the estate, still being a trustee, on the face of the deed by which he derives title, he and his assignee, whether by his own sake, or that of the sheriff, is subject to the control of the courts of equity, by which these trust estates were upheld and treated as the real ownership. See the reasoning in *Blackmer v. Phillips*, 67 N. C. 340.

The trustee or his assignee will be enjoined from enforcing his mere

³⁰ A part of the opinion dealing with a question of practice is omitted.

legal right in order to take possession of the land. From these premises he drew the conclusion that under our new system, the Court acting both as a court of equity and a court of law, the assignee of the trustee by sale on execution will not be allowed to take judgment for the recovery of the possession of the land.

The argument is well constructed, but it fails in this: Under the old system the court of equity only interfered by injunction to prevent the trustee or his assignee from taking possession as against the *cestui que trusts*, or their assignee or agent, but did not interfere in favor of a wrongdoer, who fails to connect himself in any way with the *cestui que trusts*. Such is the law under the new system. In our case, for the purposes of the motion to non-suit, the *cestui que trusts* are not before the court, and the defendant stands as a wrong-doer, withholding the possession from the plaintiff who is the owner of the legal estate.

If Camman had brought the action, the defendant, so far, as for the purposes of the motion, as the matter now stands, would not have, under the old system, entitled himself to an injunction; neither can he do so under the new system, by which the equity of the case as well as the law is administered in the same forum, for the plain reason that he stands as a wrong-doer, withholding the possession from one having the legal estate, and does not in any way connect himself with the supposed *cestui que trusts*.

There is error. Judgment reversed and venire de novo. * * *
PER CURIAM. Venire de novo.

STITH v. LOOKABILL.

(Supreme Court of North Carolina, 1877. 76 N. C. 465.)

Civil Action to recover possession of real estate, tried at Fall Term, 1875, of Cabarrus Superior Court, before Schenck, J.

The plaintiff claimed as devisee of one A. B. Stith, who bought the land in controversy at execution sale. The defendant claimed as tenant of one Sturges who claimed to be the owner in fee of said land, or if not the owner in fee, then the beneficiary owner, and entitled to the equitable fee therein.

READE, J. Land is conveyed to A. in trust for B.

A. has the legal title and conveys to C.

B. has the equitable title and conveys to D.

Who is entitled to hold the land in this Court, C. or D.?

Very clearly D. is entitled to hold the land in a court of equity as this is.

That is substantially this case, and that principle settles this case in favor of the defendant.

John M. Lisle conveyed the land to Camman in trust for certain persons. The plaintiff's deviser had an execution against Camman

levied on the land and bought is at sheriff's sale. That puts the plaintiff in the shoes of Camman with the naked legal title.

The cestui que trusts conveyed to Sloan, who conveyed to the defendant's landlord. That puts the defendant in the shoes of the cestui que trusts with the equitable title.

The plaintiff insists that, even if that principle be correct, yet it does not apply here because the defendant does not represent the cestui que trusts; that the cestui que trusts were the Conrad Hill Gold and Copper Company; and that that company attempted to join and merge itself into the North Carolina Mining Company, by proceedings which were irregular and ineffectual for that purpose, and that the said North Carolina Mining Company conveyed to Sloan, etc.

It may be admitted as contended by the plaintiff, that the deeds and proceedings relied on by the defendant, are irregular and ineffectual to pass the legal title, for if they had been ever so regular and formal they could not have passed the legal title. The legal title was in the plaintiff and not in the cestui que trusts. But what the defendant rightly insists upon is that the deeds and proceedings coupled with the facts that they were for value and were fair and bona fide, operate as assignments of the equitable interest of the cestui que trusts; and that having the possession of the land he is entitled to hold it.

There is no error.³¹

PER CURIAM. Judgment affirmed.

³¹ The creditor of an executor or administrator cannot even at law take the assets of the deceased to satisfy his debtor's individual debt. *Farr v. Newman*, 4 T. R. 621 (1792); *Gaskell v. Marshall*, 1 M. & R. 132 (1831); *Williams v. Fullerton*, 20 Vt. 346 (1848).

Some decisions hold that the creditor of a trustee cannot even at law take the trust property to satisfy the individual debt of the trustee. *Lessee of Smith v. McCann*, 24 How. 398, 16 L. Ed. 714 (1860); *Hitchcock v. Galveston Wharf Co.* (C. C.) 50 Fed. 263 (1880); *Baker v. Copenbarger*, 15 Ill. 103, 58 Am. Dec. 600 (1853); *Robison v. Botkin*, 181 Ill. 182, 54 N. E. 915 (1899); *Bostick v. Keizer*, 4 J. J. Marsh. (Ky.) 597, 20 Am. Dec. 237 (1830); *Logan v. Moore*, 7 Dana (Ky.) 74 (1838); *Booker v. Carlile*, 14 Bush (Ky.) 154 (1878); *Morrill v. Raymond*, 28 Kan. 415, 42 Am. Rep. 167 (1882); *Houston v. Nowland*, 7 Gill & J. (Md.) 480 (1836); *Bancroft v. Consen*, 13 Allen (Mass.) 50 (1866); *Hayward v. Cain*, 110 Mass. 273 (1872); *Ashurst v. Given*, 5 Watts & S. (Pa.) 323 (1843); *Wilhelm v. Folmer*, 6 Pa. 296 (1847); *Reed's Appeal*, 13 Pa. 476 (1850); *Shryock v. Waggoner*, 28 Pa. 430 (1857); *Brown v. Williamson's Executor*, 36 Pa. 338 (1860); *Miller v. Baker*, 166 Pa. 414, 31 Atl. 21, 45 Am. St. Rep. 680 (1894); *Townsley v. Barber*, 27 Vt. 417 (1855); *Barber v. Chapin*, 28 Vt. 413 (1856); *Hackett v. Callender*, 32 Vt. 97 (1859); *Hart v. Farmers' & Mechanics' Bk.*, 33 Vt. 252 (1860); *Abell, Adm'r, v. Howe*, 43 Vt. 403 (1871).

It would seem, however, that the creditor of a feoffee to use could satisfy his judgment against the feoffee individually out of the property held in use. Y. B. 14 Hen. VIII, fol. 4, pl. 5.

SMITH v. SMITH and the BANK OF WADESBOROUGH.

(Supreme Court of North Carolina, 1858. 57 N. C. 303.)

Appeal from the Court of Equity of Richmond County, from an interlocutory order made by Saunders, J.

Upon the bill and answers, the case appears to be this: Jonathan Hailey, of Richmond county, the father of the plaintiff, by his will, dated January, 1855, bequeathed as follows: "I give to my daughter Hannah, the wife of Franklin C. Smith, my slaves, Lydia, Jim, Reuben and Hannah, to the sole and exclusive use of the said Hannah Smith, separate and apart from all control, or ownership of her said husband, and free from all liability for his debts or contracts, for and during her natural life, and at her death, to her daughter Alice, and all such children as she may have then living, share and share alike, it being my express will, that the said Franklin C. Smith shall have no interest, trust, or property, either at law or in equity, in or to said negroes." After the death of the testator, the slaves went into the possession of the plaintiff, or her husband, by the assent of the executor, as the bill states. One of the slaves, Jim, about seventeen years of age, was rogueish and unmanageable, and the plaintiff, and her husband, concurred in thinking it was best to dispose of him, and the bill states that it was agreed between them, in October, 1855, that the husband should carry him off and exchange him for a female slave, that could serve in the house, or sell him, and invest the proceeds in such a female, to be held in the place of Jim, and that accordingly Smith took Jim to Richmond, Va., and soon after brought back a negro girl by the name of Harriet, about thirteen years of age, whom, he said, he had received in exchange for Jim, and also the sum of \$125 to boot, and he delivered the said girl to the plaintiff, and she accepted her, in place of Jim, agreeing that he should retain the money for his time, trouble, and expense in the transaction; that the plaintiff claimed Harriet, and held her as her separate property, under her father's will, up to August, 1858, when the sheriff of Richmond seized her under a fieri facias, on a judgment, at the instance of the Bank of Wadesborough, against Franklin C. Smith and others, and advertised her for sale as the property of Smith, the husband; and then this bill was filed by Mrs. Smith, by her next friend, who was the father's executor, against the Bank of Wadesborough and her husband, praying that the husband may be declared to hold the said Harriet in the place of Jim, in trust for her separate use, during her life, and then for her daughter Alice, and such other child or children as she may have, and that the said negroes may be properly settled upon a fit trustee, according to the purposes and trusts of the will; and that, in the meanwhile, the defendants may be restrained by injunction from proceeding to sell the slave Harriet. Upon the bill an injunction was granted as prayed for.

The answer of Smith admits all the material allegations of the bill, and submits that all the negroes, including Harriet, shall be conveyed to such trustees as the Court may designate, and settled upon the trusts declared in the will.

The answer of the other defendant, the Bank of Wadesborough, admits the bequest of the negroes by the will, and that Mark Hailey, the executor, assented to some of the legacies, but denies that he assented to the legacy of Jim, and states that Smith, the husband, as the defendant believes, took Jim against the assent of the executor, and without his knowledge. It admits the character imputed in the bill to the negro, Jim, but denies that the plaintiff requested her husband, or agreed with him, that he should carry Jim off and exchange him for a negro girl, or sell him, and with the proceeds purchase a girl in his place; and states that Jim was carried off against the will and decided opposition of the plaintiff. It also denies that Jim was exchanged for Harriet, or that Harriet was purchased with the proceeds of Jim, or was ever delivered to the plaintiff by her husband, or by her accepted in place of Jim. It states that, about the time Smith went off with Jim, he borrowed twelve or fourteen hundred dollars, and on his return stated that, on the trip, he purchased Harriet and another negro and sold the latter before he got back; that Smith took a bill of sale for Harriet in his own name, as the absolute owner, and claimed her as his own property and frequently offered to sell her, saying he could make a good title, and no claim was set up to her by the plaintiff until after the bank got the judgment against her husband, when, after becoming insolvent, he executed to the plaintiff a bill of sale for Harriet, with the intent to defraud his creditors, and absconded. The answer admits the seizure of Harriet on the execution, and the intention to sell her under it, as the property of Smith.

Upon this answer, the counsel for the Bank of Wadesborough moved to dissolve the injunction, which was refused, and the Bank appealed.

RUFFIN, J.⁸² Although the order in the court of equity does not declare the grounds on which it was made, yet, in the opinion of the court, enough appears in the pleadings to sustain it. Equity does not usually interfere to restrain a trespass, but leaves the party to legal redress. But, both from the nature of the property, and the peculiarity of the situation in which the parties stand, the plaintiff is entitled to relief. The bequest is plainly and expressly to the separate use of the wife, with a remainder to a child then born, and to such others as may come in esse. But no trustee is nominated, and, therefore, the legacy, as far, at least, as the estate of the wife is concerned, vested *jure mariti*, in the husband. But, in this court, he stands as trustee for her, upon the clear intent that he should not take for his own benefit, but that she should enjoy, for her life, as if she were sole. Parker

⁸² A part of the opinion is omitted.

v. Brooke, 9 Ves. 583; Steel v. Steel, 36 N. C. 452. He, then having the legal title, though on trust, could not maintain an action against the sheriff for taking the slave as his property, nor against the purchaser from the sheriff. It is possible that obstacles may present themselves in the way of getting the full relief asked (that of a settlement of all the negroes in trust for the plaintiff for life, and then for the children), both from the nature of the limitation in remainder to the children, and from the fact that the children are not parties. But we are not to deal with that question now, nor to anticipate the effect on the injunction of amending the bill, by bringing in the children. The controversy, at present, concerns the interest of the plaintiff alone. She has, unquestionably, an estate to her separate use in the negroes, and that is purely an equitable interest that can be asserted only in this court, and will be protected in this court, because she has either no trustee, or none that can, in the actual condition of things, make the title available at law, so as to secure her equitable interest.

Thus far the jurisdiction has been considered as if the controversy were touching the negroes specifically bequeathed, in which case, as the separate use of the wife is beyond all doubt, the court holds that she would be entitled to an injunction against the husband to restrain his alienation in breach of the trust, and to a decree securing the property to her by a proper settlement, with a fit trustee, and, therefore, that she is equally entitled to a similar relief against the creditor of the husband, endeavoring to effect a similar breach of trust, by a sale under execution, wherein the purchaser could only get (if anything) the naked legal title of the husband, and would hold it, in the view of this court, on the same trusts as attached to it in the hands of the husband. Freeman v. Hill, 21 N. C. 389; Polk v. Gallant, 22 N. C. 395, 34 Am. Dec. 410. This, however, is not the case of a seizure of one of the slaves bequeathed to the separate use of the plaintiff, but of a slave which, the bill alleges, was got in exchange for one of them by the husband, acting as the agent of the plaintiff, by an agreement between her and her husband, or purchased by him for her with the price obtained for one of the original slaves, necessarily sold for his faults, and accepted by her in his stead. It must be admitted that on those positions, if denied by the defendants, the onus is on the plaintiff. She must show that she has the same equity attaching to the slave in controversy which she had in the one her father gave her.

* * *

[The court, having concluded that the plaintiff had established this equity, affirmed the order appealed from.] ³³

³³ See Newlands v. Paynter, 4 Myl. & C. 408 (1839); Roberts v. Death, L. R. 8 Q. B. D. 319 (1881); Cooper v. Griffin, L. R. 1 Q. B. D. 740 (1892); Snediker v. Boyleston, 83 Ala. 408, 4 South. 733 (1887); Creditors of Spicer v. Spicer, 21 Ga. 200 (1857); Hollingsworth v. Trueblood, 59 Ind. 542 (1877); Rogers v. Hendsley, 2 La. 597 (1830-1831); Hunt v. Townshend, 31 Md. 336, 100 Am. Dec. 63 (1869); Hartsock v. Russell, 52 Md. 619 (1879); Houghton v. Davenport, 74 Me. 590 (1883); Lerow v. Wilmarth, 9 Allen (Mass.) 382 (1864); Han-

DYSON and Others v. SIMMONS.

(Court of Appeals of Maryland, 1878. 48 Md. 207.)

Appeal from the Circuit Court for Montgomery County, in Equity.

The appeal in this case was taken from a decree directing the sale of the mortgaged premises in the proceedings mentioned, and from an order ratifying certain auditor's accounts distributing the proceeds of sale, and rejecting others. By the accounts ratified the judgments rendered on contracts made after the date of the mortgage were awarded payment in full, and to the mortgage claim was awarded the balance, less certain expenses, which was not sufficient to pay it in full. Creditors who held judgments obtained on claims existing prior to the mortgage, Mrs. Cornelia Jones who claimed under a deed of trust, and her trustee appealed. The case is further stated in the opinion of the Court.

ALVEY, J., delivered the opinion of the court.⁸⁴

The bill in this case was filed by the appellee as assignee of Elizabeth A. Simmons, of a mortgage and single bill, for \$2,500; the single bill being executed by John L. T. Jones, and the mortgage by the said Jones and his wife; both instruments bearing date the 19th of April, 1871. The mortgage was in all respects duly executed and acknowledged by the mortgagors, and the consideration sworn to by the mortgagee; and it was filed for record within the time prescribed by law, and actually recorded, in Montgomery county, where the land mortgaged is situate; but the acknowledgment and affidavit having been made before a justice of the peace in Frederick county, there was an omission to obtain the clerk's certificate of the official character and qualification of the justice, as required by the Code, art. 24, § 3. The mortgagor, Jones, being legally indebted on contracts made both before and since the date of the mortgage, upon which a large number of judgments have been recovered subsequent to that date, the present bill is filed to enforce the mortgage, thus ineffectually recorded, upon the footing of a contract, and as an equitable charge upon the land embraced in it. This is resisted by the judgment creditors, upon the ground that their judgments have created liens upon the land, and that such liens cannot be displaced or interfered with by a prior unrecorded or equitable mortgage, which should

cóck v. Titus, 39 Miss. 224 (1860); South Presbyterian Church v. Hintze, 72 Mo. 363 (1880); Connor v. Follansbee, 59 N. H. 124 (1879); Campfield v. Johnson, 5 N. J. Eq. 245 (1845); Runn v. Mitchell, 27 N. J. Eq. 54 (1876); Ellis v. Tousley, 1 Paige (N. Y.) 280 (1828); Wylie v. White, 10 Rich. Eq. (S. C.) 294 (1858); Sandford v. Weeden, 2 Heisk. (Tenn.) 71 (1870); Baker v. Hardin, 10 Heisk. (Tenn.) 300 (1872); Parker v. Coop, 60 Tex. 111 (1883). In the following decisions the creditor of the trustee was given preference over the cestui que trust: Buck v. Webb, 7 Colo. 212, 3 Pac. 211 (1883); Roberts, Adm'r, Broom, 1 Del. Ch. 388 (1831); Kennedy v. Lee, 72 Ga. 39 (1883); Dill v. Hamilton, 118 Ga. 208, 44 S. E. 989 (1903).

⁸⁴ Only so much of the opinion as deals with the first question is given.

only be enforced as against the mortgagor, and his ordinary or non-lien creditors, existing at the date of the mortgage.

Two questions arise: 1st, whether the lien of a judgment can be displaced or subordinated to that of a prior equitable mortgage or charge? and, 2ndly, if such mortgage or charge can be enforced as against judgment liens, in what order are the creditors to be affected thereby?

1. The principle is now so well settled, that it would seem to be beyond all question and controversy, that if a party makes a mortgage, or affects to make one, but it proves to be defective, by reason of some informality or omission, such as failure to record in due time, defective acknowledgment, or the like, though even by the omission of the mortgagee himself, as the instrument is at least evidence of an agreement to convey, the conscience of the mortgagor is bound, and it will be enforced by a court of equity. *Taylor v. Wheeler*, 2 Vern. 565; *Mestaer v. Gillispie*, 11 Ves. 621, 624; *Price & Bevan v. McDonald*, 1 Md. 414, 54 Am. Dec. 657. As against the mortgagor himself this proposition was never regarded as questionable (*Carson & Vickery v. Phelps*, 40 Md. 73), but as against judgment creditors of the mortgagor, obtaining their judgments subsequent to the date of the mortgage, there was formerly some dispute. The question, however, both in England and in this State, has been long since settled; and the cases, without an exception, so far as we are informed, hold that a judgment, being but a general lien, must be subordinated to the superior equity of a prior specific lien, created by a defective mortgage or conveyance. Judgments create liens only because the land is made liable by statute to be seized and sold on execution: *Miller v. Allison*, 8 Gill & J. 38; *Coombs v. Jordan*, 3 Bland, 284, 298-310, 22 Am. Dec. 236; *Eschbach v. Pitts*, 6 Md. 77; *Tayloe v. Thomson*, 5 Pet. 358, 8 L. Ed. 154. But such lien secures to the creditor neither *jus in re* nor *jus ad rem*: *Ex parte Knott*, 11 Ves. 609, 617; *Lacy v. Fugle*, 2 Phill. 442; *Conard v. Atlantic Ins. Co.*, 1 Pet. 442-443, 7 L. Ed. 189. At the time of the execution of this mortgage the mortgagor had full and complete power of conveying or charging the land, provided it was bona fide as against existing creditors, and the general principle is, that if a party has power to charge certain lands, and agrees to charge same, in equity he has actually charged them; and a court of equity will enforce the charge. *Alexander v. Ghiselin*, 5 Gill, 187; *Rolleston v. Morton*, 1 Dr. & War. 195. And the fact that judgments have been subsequently recovered against the party agreeing to convey or charge the land, will in no manner defeat the right to have the agreement executed. As has been very properly said, a judgment has relation to the time when it is entered up. It will not affect any bona fide conveyance made for value before that time, for it only attaches upon that which is then, or afterwards becomes the property of the debtor. The fact that the debtor may retain the property at law does not change the principle upon which a court of equity proceeds. If the

property is charged in equity before the entry of the judgment, the judgment will not affect such charge. *Whitworth v. Gaugain*, 1 Phill. 728, 729. The judgment creditor therefore stands in the place of his debtor, and he can only take the property of his debtor, subject to the equitable charges to which it was justly liable in the hands of the debtor, at the time of the rendition of the judgment,—except in those cases where the principle may have been modified by express statute. *Taylor v. Wheeler*, 2 Vern. 565; *Finch v. Earl of Winchelsea*, 1 P. Wms. 277, 282; *Sir Simeon Stewart's Case*, cited in *Burn v. Burn*, 3 Ves. 573, and stated and approved in *Alexander v. Ghiselin*, 5 Gill, 185.

In no case to be found in the books is the question more directly and strongly presented than in that of *Whitworth v. Gaugain*, 3 Hare, 416. In that case, an equitable mortgagee of lands was held to be entitled in equity to enforce his charge on the land in priority to a creditor of the mortgagor, who, without notice of the equitable mortgage, had, subsequently thereto, recovered judgment against the mortgagor, and obtained actual possession of the land by writ of elegit and attornment of the tenants. A stronger case than that could hardly be stated; and yet it was held, upon full review of the cases, that, notwithstanding the judgment had been executed to the extent of obtaining actual possession of the land under the elegit, the equitable mortgagee had the superior equity, and, consequently, was entitled to priority. That case was affirmed on appeal, upon full review of the authorities by the Lord Chancellor (1 Phill. 728), and it has been fully approved in subsequent cases. *Abbott v. Stratton*, 3 Jones & Lat. 603; *Eyre v. McDowell*, 9 H. L. Cas. 619, 642; *Beavan v. Lord Oxford*, 6 De G., M. & Gord. 507. These cases are the stronger, as they involve the consideration of the Act of 1 & 2 Vict. ch. 110, as applicable to England, and the similar Act of 3 & 4 Vict. ch. 105, as applicable to Ireland, which enacted that a judgment shall operate as a charge on all lands of which the judgment debtor shall, at the time of entering up judgment or afterwards, be seized or possessed, or over which such judgment debtor shall, at the time of entering up judgment or afterwards, have any disposing power which he might, without the consent of any other person, exercise for his own benefit. These statutes, it was decided, contained nothing to vary the rule as to the equities to which the property may be subject. For, as said by Lord Cranworth, in *Eyre v. McDowell*, *supra*, the debtor could not have appropriated the land in question to the liquidation of his debt, without first satisfying the claim of his equitable mortgagee, and the Legislature did not intend to enable the creditor by judgment to take what his debtor could not give.

This well established principle of the English cases has been fully adopted in our own; and the cases to which we are about to refer, are, we think, quite decisive of the question under consideration. [Here the court refers to *Hampson v. Edelen*, 2 Har. & J. 64, 3 Am.

Dec. 530; *Repp v. Repp*, 12 Gill & J. 341; *Alexander v. Ghiselin*, 5 Gill, 138.]

It is clear, therefore, that the fact of the existence of judgments, recovered subsequent to the date of the mortgage, gives to the judgment creditors no such fixed lien upon the land as to exclude or defeat the security intended by the mortgage; and it was in accordance with this view that the decree appealed from was passed.⁸⁵ * * *

Decree affirmed.

MOYER v. HINMAN.

(Court of Appeals of New York, 1855. 13 N. Y. 180.)

In October, 1835, H. W. Schroepfel being the owner of two hundred and fifty acres of land, situate in Oswego county, contracted with the plaintiff to sell and convey to him a part of it containing sixty acres, at the agreed price of \$465; fifty dollars of the purchase price to be paid down, and the residue at or before the expiration of ten years with annual interest. By the contract it was agreed that the plaintiff should have immediate possession of the premises, and on payment of the purchase money, the same should be conveyed to him in fee by Schroepfel. The following spring the plaintiff entered into possession of the land mentioned in the contract, which was wild, and erected a house and commenced making other improvements thereon. From that time till the commencement of this action, he occupied and improved the premises.

In 1838, R. S. Corning recovered a judgment against Schroepfel in the Supreme Court, which then became a lien on the real estate of the latter, situate in Oswego county; and in 1844, an execution upon this judgment was issued to the sheriff of Oswego county, who, by virtue thereof, in August of that year, sold the premises contracted to the plaintiff, together with the residue of the two hundred and

⁸⁵ *Burgh v. Francis*, 3 Swanston, 536, note (a) (1673); *Brace v. Duchess of Marlborough*, 2 P. Wms. 491 (1728); *Casberd v. Atty. Genl.*, 6 Price, 411 (1819); *Whitworth v. Gaugain*, 3 Hare, 416 (1844), affirmed 1 Phillips, 728 (1846); *Abbott v. Stratten*, 3 J. & Lat. 603 (1846); *Brearcliff v. Dorrington*, 4 De G. & Sm. 122 (1850); *Dunster v. Lord Glengall*, 3 Ir. Ch. 47 (1853); *Scott v. Lord Hastings*, 4 K. & J. 633 (1858); *Eyre v. McDowell*, 9 H. L. C. 619 (1861); *Pickering v. Ilfracombe Ry. Co.*, L. R. 3 C. P. 235 (1868); *Robinson v. Williams*, 22 N. Y. 380 (1860); *Ins. Co. of Pa. v. Phoenix Ins. Co.*, 71 Pa. 31 (1872); *Delaire v. Keenan*, 3 Desaus. (S. C.) 74, 4 Am. Dec. 604 (1809).

The same principle gives the mortgagee of after-acquired property priority over the creditor of the mortgagor. *Holroyd v. Marshall*, 10 H. L. C. 191 (1861); *Brown v. Bateman*, L. R. 2 C. P. 272 (1867); *Pennock v. Coe*, 23 How. 117, 16 L. Ed. 436 (1859); *Robinson v. Mauldin*, 11 Ala. 977 (1847); *Floyd v. Morrow*, 26 Ala. 353 (1855); *Hamlin v. Jerrard*, 72 Me. 62 (1881); *Sillers v. Lester*, 48 Miss. 513 (1873); *Wright v. Bircher's Ex'r*, 72 Mo. 179, 37 Am. Rep. 433 (1880); *Rutherford v. Stewart*, 79 Mo. 216 (1883); *France v. Thomas*, 86 Mo. 80 (1885); *Smithurst v. Edmunds*, 14 N. J. Eq. 408 (1862); *Philadelphia, W. & B. R. Co. v. Woelpper*, 64 Pa. 366, 3 Am. Rep. 596 (1870); *Groton Mfg. Co. v. Gardiner*, 11 R. I. 626 (1877); *First Nat. Bank of Alexandria v. Turnbull*, 32 Grat. (Va.) 695, 34 Am. Rep. 791 (1880). Contra: *Ross v. Wilson*, 7 Bush (Ky.) 29 (1869).

fifty acres, and gave the usual sheriff's certificate of sale to Corning, the plaintiff in the execution, who was the purchaser at the sale. A duplicate of this certificate was duly filed by the sheriff in the clerk's office of Oswego county. In August, 1845, Corning sold and assigned to the defendant the sheriff's certificate, and in the ensuing January the premises were conveyed to him by the sheriff, pursuant to the sale and certificate. The sheriff's deed to the defendant was duly recorded in Oswego county, in February, 1846.

Intermediate the recovery of the judgment and the sale by virtue of the execution, the plaintiff made several payments to Schroepfel upon the contract; and in October, 1845, after the sale and assignment of the sheriff's certificate to the defendant, but before the execution of the sheriff's deed, he made a further payment to Schroepfel on the contract, of \$224. When the plaintiff made these payments, he had no actual notice of the judgment or of the sale made by the sheriff.

Soon after the defendant received his deed, he notified the plaintiff and forbid his making further payments to Schroepfel, and offered to convey to him the premises on his paying to the defendant the amount unpaid upon the contract at the time of the sheriff's sale. This the plaintiff declined to do, and the defendant, in 1851, brought an action against him to recover possession of the premises. The plaintiff thereupon tendered to the defendant the amount due upon the contract after crediting the \$224, paid Schroepfel after the sheriff's sale, and before he conveyed to the defendant and demanded a conveyance of the premises described in the contract; and the defendant declining to accept the amount and execute the deed, this action was instituted to compel him to do so, and to stay the suit commenced to recover possession of the premises. This action was tried before Mr. Justice Pratt without a jury, in 1852. He found the facts above stated, and decided that the payment made to Schroepfel in October, 1845, was not valid as against the defendant, and that the latter was entitled to demand and receive the amount owing on the contract at the time of the sheriff's sale, and he ordered judgment that the defendant convey the premises to the plaintiff, on his paying this amount. The plaintiff excepted, and the judgment having been affirmed by the Supreme Court at general term in the Fifth district, he appealed to this court.

DENIO, J.³⁶ The counsel for the parties in this case agree that the plaintiff, being in possession under his contract at the time of docketing the judgment under which the defendant claims, is to be protected in equity as to his rights which existed at that time; and the position is so well established by authority as to have become an elementary doctrine in this branch of the law of real estate. I consider it equally well settled that the docketing of a judgment against the vendor affords no notice of its existence, either actual

³⁶ A part of the opinion of Denio, J., and the concurring opinion of Hand, J., are omitted.

or constructive, to the prior vendee of the judgment debtor. Parties who deal with the debtor respecting his lands subsequently to the docketing of the judgment, are affected with notice. Such persons may make themselves perfectly safe in that particular, by searching the docket book of judgments in the proper office; and they will, of course, abstain from purchasing if they find the land which they are proposing to buy, encumbered by a judgment. So, it may be said, a party holding a contract upon which payments remain to be paid, may, before making such payments, examine for judgments against the vendor; but it would be an intolerable inconvenience to require this, where the payments, as is usually the case, are to be made annually or oftener; and should such examination ever be strict, the vendee would have to run the risk of an encumbrance intervening, while he was going from the office where the same was made to the residence of the vendor to make the payment. It has been repeatedly decided that the docketing of a judgment or the recording of a mortgage is no notice to a prior purchaser or mortgagee of the premises whose conveyance is on record, or of which notice was had, the object of the recording acts, and of the law requiring judgments to be docketed, being, it is said, to protect subsequent purchasers and incumbrancers against previous deeds, mortgages, etc., which are not recorded and of which they had no notice, and to deprive the holder of the prior unrecorded conveyance or mortgage of the right which his priority would have given him at the common law. *Cheeseborough v. Millard*, 1 John. Ch. 409, 7 Am. Dec. 494; *Stuyvesant v. Hall*, 2 Barb. Ch. 151. The plaintiff in this case being in possession under his contract, that circumstance was notice to all persons who might subsequently become interested in any way in the premises, not only of such possession, but of the terms of the contract and of all his existing rights under it.

In the view of a court of equity, his condition was like that of a party having a prior conveyance or lien which was duly recorded. When, therefore, Corning had recovered his judgment against Schroepfel, the situation of the respective parties was this: The plaintiff was the equitable owner of the land, subject to future payments to be made by him, and the judgment creditor had notice of his situation and of his rights; but the plaintiff had no notice and was not chargeable with notice of the lien of his creditor. The creditor had at law the right to acquire the legal title to the land by means of a sheriff's sale and a purchase by himself; but in equity his rights were limited to the future payments to be made by the plaintiff. But as the vendee had no notice of the judgment creditor's lien, and the creditor had full notice of the vendee's situation, it would seem to be reasonable that in order to intercept those payments and divert them from the vendor's hands into his own, the creditor ought at least, to inform the vendee of the existence of his lien and of his right to the unpaid purchase money.

In accordance with this view, it was held, in a case in Maryland, that where the vendee, subsequently to the recovery of a judgment against the vendor, but without actual notice thereof, had paid over a balance of the purchase money and taken a conveyance from the judgment debtor, such vendee was, in equity, entitled to be protected against the claim of the judgment creditor. *Hampson v. Edelen*, 2 Har. & J. (Md.) 64, 3 Am. Dec. 530. * * *

If then, the payment made by the plaintiff to Schroepfel is not affected by the docketing of Corning's judgment, I am not aware of any principle upon which the sale upon the execution and the purchase of the premises by Corning, under which the defendant holds, can prejudice that payment. The sale converted the general lien into a particular one upon these premises. It was still but a lien; for any judgment creditor of Schroepfel might, notwithstanding, redeem the premises. But the consideration, which in my judgment, prevents its having the effect claimed for it, of cutting off the plaintiff's right to pay Schroepfel, is, that the former had no notice of the transaction, while Corning and the defendant must be considered as having full notice of the plaintiff's rights. Admitting that Schroepfel had no right to the money, and that Corning or the defendant had, either the plaintiff or the defendant must lose the money; and the rule in such cases is that the party shall suffer who, by his acts or omission, permitted the money to go into the hands of a party not entitled to it. The defendant could readily have informed the plaintiff of the judgment and of the sheriff's sale; and then if the plaintiff had chosen to pay Schroepfel, instead of refusing so to pay, or to take measures by bill of interpleader or otherwise, if threatened by a suit by Schroepfel, perhaps the payment would have been in his own wrong. As the case stands, he paid the money to the party holding his obligation for the payment without any notice that any other person had become interested in that contract, or had any right to the money which he had engaged to pay to Schroepfel. * * *

The judgment of the Supreme Court should be modified, and a judgment should be given in accordance with this opinion, to be settled by one of the judges of this court. The defendant should pay the costs in the Supreme Court.³⁷

³⁷ In many jurisdictions, so long as the vendor retains the legal title, his judgment creditor acquires a charge thereon as security for the unpaid purchase money, and a purchaser of the legal title at execution sale can hold the same as such security. A payment by the vendee to the vendor in ignorance of the judgment or sale will pro tanto lessen this right. *Doe ex dem. Nickles v. Haskins*, 15 Ala. 619, 50 Am. Dec. 154 (1849); *Sellers v. Hayes*, 17 Ala. 749 (1850); *Hardee v. McMichael, Adm'r*, 68 Ga. 678 (1882); *Bell v. McDuffie*, 71 Ga. 264 (1883); *Simpson v. Niles*, 1 Ind. 196 (1848); *Gaar v. Lockridge*, 9 Ind. 92 (1857); *Holman v. Creagmiles*, 14 Ind. 177 (1860); *Burke v. Johnson*, 37 Kan. 337, 15 Pac. 204, 1 Am. St. Rep. 252 (1887); *Doe on dem. Riley v. Million*, 4 J. J. Marsh. (Ky.) 395 (1830). See, however, *Cooper v. Arnett*, 95 Ky. 603, 26 S. W. 811 (1894); *Hampson v. Edelen*, 2 Har. & J. (Md.) 64, 3 Am. Dec. 530 (1807); *Doak v. Runyan*, 33 Mich. 75 (1875); *Corey v.*

BROWN v. PIERCE.

(Supreme Court of the United States, 1868. 7 Wall. 205, 19 L. Ed. 134.)

Error to the Supreme Court of Nebraska Territory.

Brown filed his bill in September, 1860, in the court below against three persons, Pierce, Morton, and Weston, alleging that in the spring of 1857 he settled upon and improved a tract of land near Omaha; that he erected a house on the tract and continued to occupy it until August 10, 1857, when he entered the tract under the pre-emption laws of the United States; that Pierce claimed the land by virtue of the laws of an organization known as the Omaha Claim Club; that this organization, consisting of very numerous armed men, sought to, and did to a great extent, control the disposition of the public lands in the vicinity of Omaha in 1857, in defiance of the laws of the United States; that it frequently resorted to personal violence in enforcing its decrees; that the fact was notorious in Omaha, and that he, Brown, was fully advised in the premises; that as soon as he had acquired title to the land, Pierce, together with several other members of the club, came to his house and demanded of him a deed of the land, threatening to take his life by hanging him, or putting him in the Missouri river, if he did not comply with the demand; that the club had posted handbills calling the members together to take action against him, and that knowing all this, and in great fear of his life, he did, on the 10th of August, 1857, convey the land by deed to Pierce; that he, Brown, received no consideration whatever, for the conveyance; that from the date of his settlement upon said land, until the time of filing the bill, he had continued to keep possession either

Smalley, 106 Mich. 257, 64 N. W. 13, 58 Am. St. Rep. 474 (1895); Filley v. Duncan, 1 Neb. 134, 93 Am. Dec. 337 (1871); Courtney v. Parker, 16 Neb. 311, 20 N. W. 120 (1884), s. c. 21 Neb. 582, 33 N. W. 262 (1887); Olander v. Tighe, 43 Neb. 344 (1895); Wehn v. Fall, 55 Neb. 547, 76 N. W. 13, 70 Am. St. Rep. 397 (1898); Lane v. Ludlow, 6 Paige (N. Y.) 316, note a (1837); Smith v. Gage, 41 Barb. (N. Y.) 60 (1863); Butler v. Brown's Heirs, 5 Ohio St. 211 (1855); Jefferson v. Dallas, 20 Ohio St. 68 (1870); Coggs v. Marine Bk. Co., 63 Ohio St. 88, 57 N. E. 1086 (1900); Fasholt v. Reed, 16 Serg. & R. (Pa.) 266 (1827); McMullen v. Wenner, 16 Serg. & R. (Pa.) 18, 16 Am. Dec. 543 (1827); Stewart v. Coder, 11 Pa. 90 (1849); Patterson's Estate, 25 Pa. 71 (1855); Kinports v. Boynton, 120 Pa. 306, 14 Atl. 135, 6 Am. St. Rep. 706 (1888); Snyder v. Botkin, 37 W. Va. 355, 16 S. E. 591 (1892).

In some jurisdictions the judgment creditor of the unpaid vendor and the purchaser at execution sale with notice of the vendee's rights acquire no rights. *Strauss v. White*, 66 Ark. 167, 51 S. W. 64 (1899); *Baldwin v. Thompson*, 15 Iowa, 504 (1864); *Woodward v. Dean*, 46 Iowa, 499 (1877); *Money v. Darsey*, 15 Miss. 15 (1846); *Taylor v. Lowenstein*, 50 Miss. 278 (1874); *Chisholm v. Andrews*, 57 Miss. 636 (1880); *Jones v. Howard*, 142 Mo. 117, 43 S. W. 635, 64 Am. St. Rep. 546 (1897); *Moore v. Byers*, 65 N. C. 240 (1871); *Tally v. Reed*, 72 N. C. 336 (1875); *Folger v. Bowles*, 72 N. C. 603 (1875); *Adickes v. Lowry*, 15 S. C. 128 (1879).

If the purchase money has been fully paid, the vendee may enjoin a sale under an execution against the vendor. *Finch v. Earl of Winchelsea*, 1 P. Wms. 277 (1715); *Prior v. Penpraze*, 4 Price, 99 (1817); *Valentine v. Seiss*, 79 Md. 187, 28 Atl. 892 (1894).

actually or constructively; that Morton claimed an interest in the premises by virtue of a judgment lien, and that Weston also made some claim.

The prayer was, that the deed might be declared void, and Pierce be decreed to reconvey, and for general relief.

The bill was taken *pro confesso* as to all the defendants, except Morton, who answered.

This answer, stating that he, Morton, was not a resident of the territory, and had no knowledge or information about the facts alleged in the bill, but on the contrary was an utter stranger to them, and therefore could not answer as to any belief concerning them, set forth, that on the 28th of August, 1857, Pierce was "the owner and in possession of, and otherwise well seized and entitled to, as of a good and indefeasible estate of inheritance in fee simple," the tract in controversy; that being so, and representing himself to be so, and having need of money in business, he applied to him, Morton, to borrow the same, and that he, Morton, being induced by reason of the representation, and also by the possession, and believing that he, Pierce, was the owner, he was thereby induced to lend, and did lend to him \$6,000, on the personal security of him, Pierce; that before the filing of this bill by Brown, he, Morton, had obtained judgment against Pierce for \$3,400, part of the loan yet unpaid; that this judgment was a lien on the lands; and that as he, Morton, was informed and believed, if he could not obtain his money from this land, he would be wholly defrauded out of it.

The court below declared Brown's deed void, and decreed a reconveyance from Pierce to him and that neither Morton nor Weston had any lien on the premises. Morton now brought the case here for review.

Mr. Justice CLIFFORD delivered the opinion of the Court. * * * ³⁸

Next question which arises in the case is, whether the judgment set up by the appellant creates a superior equity in his favor over that alleged and proved by the appellee. * * *

Express decision of this Court is, that the lien of a judgment constitutes no property in the land, that it is merely a general lien securing a preference over subsequently acquired interests in the property, but the settled rule in chancery is, that a general lien is controlled in such courts so as to protect the rights of those who were previously entitled to an equitable interest in the lands or in the proceeds thereof.

Specific liens stand upon a different footing, but it is well settled that a judgment creates only a general lien, and that the judgment creditor acquires thereby no higher or better right to the property or assets of the debtor, than the debtor himself had when the judgment was rendered, unless he can show some fraud or collusion to impair his rights. Drake on Attachments, § 223.

³⁸ A part of the opinion is omitted.

Correct statement of the rule is, that the lien of a judgment creates a preference over subsequently acquired rights, but in equity does not attach to the mere legal title to the land, as existing in the defendant at its rendition, to the exclusion of a prior equitable title in a third person. *Howe*, Petitioner, 1 Paige (N. Y.) 128, 19 Am. Dec. 395; *Ells v. Tousley*, 1 Paige (N. Y.) 283; *White v. Carpenter*, 2 Paige (N. Y.) 219; *Buchan v. Sumner*, 2 Barb. Ch. (N. Y.) 181, 47 Am. Dec. 305; *Lounsbury v. Purdy*, 11 Barb. (N. Y.) 494; *Keirsted v. Avery*, 4 Paige (N. Y.) 15.

Guided by these considerations, the Court of Chancery will protect the equitable rights of third persons against the legal lien, and will limit that lien to the actual interest which the judgment debtor had in the estate at the time the judgment was rendered. * * *

Decree affirmed.

HARRIS v. GAINES.

(Supreme Court of Tennessee, 1878. 2 Lea, 12.)

Appeal from the Chancery Court at Waverly. G. H. Nixon, Chancellor.

McFARLAND, J., delivered the opinion of the Court.⁸⁹

The bill in substance charges that on the 12th day of July, 1877, the complainant entered into a contract with the defendant, Gaines, and in pursuance of that contract conveyed to said Gaines and the defendant, Morris, a small tract of land in Humphreys county, and gave them his two obligations for \$150, due respectively in two and three years after date, one of which he has paid to their assignee, and on the other he has paid \$100, in consideration of all which said Gaines made to complainant a deed for certain lands which he claimed he and Morris owned in Missouri, but Morris did not join in the deed; that in this transaction a gross fraud was committed upon him; that Gaines represented that the title to the land in Missouri was clear and unincumbered, and in their possession, and suggested to complainant, who resided in this State, to write to certain parties, named by Gaines, for information, he, Gaines, having in the meantime fraudulently suggested to these parties the answers to return, so as to deceive and mislead the complainant. He charges that on investigation he found that Gaines and Morris really owned no land in Missouri. The land Gaines proposed to convey had never been paid for, a vendor's lien existed thereon, and they were not in possession; so that complainant would, in reality, have to purchase the land again before he could get any title or possession.

After the plaintiff had conveyed his land to Gaines and Morris, the defendant, Lucas, who had a judgment against Gaines, caused execution to be levied on the land, and was proceeding to have it

⁸⁹ A part of the opinion is omitted.

condemned, when Gaines filed his bill enjoining a condemnation, which bill is still pending.

The prayer is for a rescission and that the cause be consolidated and heard with the cause of Gaines and Lucas.

Lucas filed a demurrer assigning four causes, two of which, the third and fourth, were sustained by the Chancellor, and the bill dismissed as to him. [After concluding that the demurrers should have been overruled, the Court proceeded as follows:]

Another ground of demurrer assigned is, that it not being alleged that Lucas had knowledge of the fraud, the levy of his execution gave him a right prior to the claims of the complainant. This ground of demurrer was not acted upon by the Chancellor and in strictness, perhaps, we need express no opinion upon it. It being alleged that Gaines has a bill pending to enjoin the execution of Lucas, it may become unnecessary to decide the question. If Lucas' levy gave him priority, that right may be enforced on final decree without now discussing the bill as to him. However, the weight of authority and reason is, we think, that the mere levy of an execution without sale fixes a lien attaching to the legal title, and this is subject to any equity against the debtor, relating to period of time prior to the levy, and such levy is not a superior lien to the right of the grantor to rescind for duress or fraud. * * *

Decree reversed and demurrer overruled, Lucas paying costs of this court.

WHITE and Others v. WILSON and Another.

(Supreme Court of Indiana, 1843. 6 Blackf. 448, 39 Am. Dec. 437.)

Error to the Tippecanoe Circuit Court.

BLACKFORD, J. Wilson and another filed a bill in chancery against White and others. The object of the bill was to have a mistake in a mortgage, which had been executed by one of the defendants to the complainants, corrected by the insertion in the mortgage of a certain tract of land which, by mistake, had been omitted, and also to secure the land so omitted from being liable to certain judgments against the mortgagor. The Circuit Court, on the bill, answers, depositions, etc., rendered a decree correcting the mistake, and freeing the land omitted in the mortgage from the lien of the judgments.

The facts necessary to be noticed in this case are as follows: Hunt, one of the defendants, mortgaged certain lands to the complainants, in order to secure them against loss as his endorsers of a promissory note. A tract of land, intended by the parties to be included in the mortgage, was omitted by mistake. Subsequently to the mortgage, and before the bill was filed, certain creditors of Hunt obtained judgments against him; and the complainants had reason to apprehend that executions on the judgments would be levied on the land, which, by

mistake, had been omitted in the mortgage. The complainants had paid the note, which was for a larger amount than the mortgaged lands and the tract omitted were worth; and Hunt was insolvent.

We think the decree is right. The court had authority to correct the mistake. Mitford's Ch. Pl. 184; Gillespie v. Moon, 2 John. Ch. (N. Y.) 585, 7 Am. Dec. 559. And the land omitted in the mortgage, the mistake being corrected, was not subject to the judgments. It is said by Judge Story, that, in all cases of mistake in written instruments, courts of equity will interfere as between the original parties, or those claiming under them in privity, such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment creditors, or purchasers from them with notice of the facts. 1 Story's Eq. 178. See, also, Burgh v. Francis, 1 Eq. Cas. Abr. 320; Taylor v. Wheeler, 2 Vernon, 564; Finch v. The Earl of Winchelsea, 1 P. Williams, 277; In the Matter of Howe, 1 Paige (N. Y.) 125, 19 Am. Dec. 395.

PER CURIAM. The decree is affirmed with costs.⁴⁰

HARNEY et al. v. FIRST NAT. BANK OF JERSEY CITY et al.

(Court of Chancery of New Jersey, 1894. 52 N. J. Eq. 697, 29 Atl. 221.)

PITNEY, V. C.⁴¹ * * * Three questions are to be solved: First. Was the lot of land in question partnership assets? And, second, if so, is the right of the judgment creditors superior to that of the complainants? Third. Are the complainants in a position to assert their equity?

[The Vice Chancellor concluded that the lot was partnership property.]

2. William A. Harney failed early in 1893, and on the 17th of March, 1893, the defendant Bowen, as assignee of Clark & Demarest, recovered a judgment against him for \$399.29; and on the 7th of

⁴⁰ That the equity of reformation is good against attaching or execution creditors without regard to notice, see, also, Stone v. Hale, 17 Ala. 557, 52 Am. Dec. 185 (1850); Whitehead v. Brown, 18 Ala. 682 (1851); Early v. Owens, 68 Ala. 171 (1880); Berry v. Sowell, 72 Ala. 14 (1882); Bailey v. Timberlake, 74 Ala. 221 (1883); Orr v. Echols, 119 Ala. 340, 24 South. 357 (1898); Blackburn v. Randolph, 33 Ark. 119 (1878); Ft. Smith Milling Co. v. Mikles, 61 Ark. 123, 32 S. W. 493 (1895); Wall v. Arrington, 13 Ga. 88 (1853); Burke v. Anderson, 40 Ga. 535 (1869); Lowe, Adm'r, v. Allen, 68 Ga. 225 (1881); Phillips v. Roquemore, 96 Ga. 719, 23 S. E. 855 (1895); Kerchner v. Frazier, 106 Ga. 437, 32 S. E. 351 (1898); Boyd v. Anderson, 102 Ind. 217, 1 N. E. 724 (1885); Welton v. Tizzard, 15 Iowa, 495 (1864); Rea v. Wilson, 112 Iowa, 517, 84 N. W. 539 (1900); Bush v. Bush, 33 Kan. 556, 6 Pac. 794 (1885); Bodwell v. Heaton, 40 Kan. 36, 18 Pac. 901 (1888); Young v. Coleman, 43 Mo. 179 (1869); Martin v. Nixon, 92 Mo. 26, 4 S. W. 503 (1887); Galway v. Malchow, 7 Neb. 285 (1878); Chadron Building & Loan Ass'n v. Hamilton, 45 Neb. 369, 63 N. W. 808 (1895); Strang v. Beach, 11 Ohio St. 283, 78 Am. Dec. 308 (1860).

⁴¹ A part of the opinion is omitted.

June, 1893, the First National Bank of Jersey City recovered a judgment for \$4,061.55, and subsequently, on the 14th of August, 1893, the bank recovered a further judgment against him for the sum of \$1,638.46. Upon this last judgment execution was issued and returned unsatisfied. William A. Harney was then examined under supplementary proceedings, and upon such examination his interest in this property was discovered, and an alias execution was issued and duly levied upon the lot in question, and it was advertised for sale.

The defendants contend that, by virtue of their several judgments and levies, they acquired a lien upon the one-third interest of W. A. Harney, which is superior in right to the equity of the executors of the deceased partner. They do not deny that the executors have an equity, but they say it is a secret one, and must yield to the statutory lien of a judgment.

The general rule is that an equity of this sort is superior to that of a judgment creditor or any other party acquiring an interest from the holder of the legal title, except it be a bona fide purchaser for value. The principle is that the lien of a judgment reaches only such right as the defendant in execution has in the property, subject to all equities against it. The holder of the legal title of real estate which constitutes part of the assets of a partnership holds it in trust for the firm, "so far, at least, as may be necessary to pay the partnership debts, and adjust the equities between the partners." *Pillsbury v. Kingon*, 31 N. J. Eq. 619, at page 625, and cases cited; *Lindl. Partn.* p. 351 et seq.; and see remarks of Mr. Justice Dixon in *Arnold v. Hagerman*, 45 N. J. Eq. 186, at page 197, 17 Atl. 93, 14 Am. St. Rep. 712. This trust in favor of the firm results from the mere fact that the land was bought and paid for with partnership funds, for partnership purposes, and is a part of the partnership property. The doctrine is quite familiar, and perfectly well settled. [Authorities cited.]

The well-settled and only ground upon which a person dealing with the holder of the title of real estate subject to a secret trust, of which he has no notice, is permitted to obtain from him a title clear of the trust is that he parts with something of value on the strength of the apparent ownership of the land. This is the very essence of the doctrine of bona fide purchaser. The rule is universal in equity that, in order to constitute a person a bona fide purchaser for value, he must have parted with something either in the way of money or valuable thing, or of a right of action, or have given up some lien which he already had, or assumed some new obligation. He must have altered his position irretrievably in "actual reliance" upon the apparent title of the other party to a particular piece of property. 2 Pom. Eq. Jur. §§ 745, 747; *Basset v. Nosworthy*, 2 White & T. Lead. Cas. Eq. (4th Am. Ed.) 82, 83.

Now, a mere judgment creditor is not clothed with this armor. He has parted with nothing on the strength of the apparent title of his debtor in any particular parcel of property. Such apparent owner-

ship has not misled him to his injury. He may be disappointed, but mere disappointment does not amount, in legal contemplation, to injury.

In the case in hand it appears affirmatively that neither of the creditors knew that the debtor had the title to this land until after they had obtained judgment. But if they had acquired such knowledge previous to the credit, or to bringing suit on their debts, the situation and rights of the parties would not be changed, for the mere giving general credit on the strength of the apparent ownership of the property does not constitute one a bona fide purchaser. Nor does the incurring the expense of a suit at law create an estoppel. *Phillipsburg Bank v. Fulmer*, 31 N. J. Law, 52, at page 55. [Authorities cited.]

Our recording statutes do, indeed, declare that unrecorded deeds of conveyance absolute of land (Revision, p. 155, § 14), and unrecorded deeds of mortgage or conveyances in the nature of mortgages of lands (Revision, p. 706, § 22), shall be void as against subsequent judgment creditors and bona fide purchasers and mortgagees for value.

But these provisions do not, by their terms, include resulting trusts, or other purely equitable rights or liens, and they have never, so far as I am informed, been construed by our courts to have such effect.

The subject-matter of the legislation of which they form a part is the providing for the acknowledgment, proof of execution, and recording of deeds, etc; and it would be a great stretch of the power of construction to hold them to extend to rights which, from their very nature, are incapable of record. See, on this subject, *Martin v. Bowen*, 51 N. J. Eq. 452, 26 Atl. 823.

The reasoning, however, which excludes mere judgment creditors from the position of bona fide mortgagees, except when expressly given that position by the statute, does not apply to purchasers for value without notice (other than the plaintiff) upon executions upon judgments. Such purchasers have all the qualifications of bona fide purchasers for value, and are protected as such. 2 Pom. Eq. Jur. § 724. * * *

3. The next question is whether the complainants are in a position to enforce their equity.

It is insisted that to give them standing in this court they must either have established their claim by a judgment at law or the subject-matter of the suit must have been brought within the jurisdiction of the court by a decree of dissolution and judicial seizure of the assets prior to the judgment.

Neither of these positions is tenable. While it is well settled that a mere creditor at large of the firm has no standing in this court to prevent an improper application of the firm's assets (*Young v. Frier*, 9 N. J. Eq. 465), it is equally well settled, as I think, upon the plainest principles, that a partner, as such, may maintain such a suit in this court by virtue of his equitable right or lien in the property in question. *Deveney v. Mahoney*, 23 N. J. Eq. 247, at pages 249 [bottom],

250, and cases cited; to which I add: 1 Madd. Ch. Pr. 135; 1 Story, Eq. Jur. § 678, and cases cited; *Beavan v. Lewis*, 1 Sim. 376; Kerr, *Inj.* 169; *Lindl. Partn.* 359; *Greenwood v. Brodhead*, 8 Barb. (N. Y.) 593. * * *

I think the complainants are entitled to the relief prayed for, and that the sale should be stayed until the partnership debts are paid, and the accounts adjusted; and will advise a decree accordingly.⁴²

EVERETT v. DREW and Others.

(Supreme Judicial Court of Massachusetts, 1880. 129 Mass. 150.)

MORTON, J. This is an action of contract, and the substantial allegations of the plaintiff's declaration are, that the defendants made an arrangement with Elijah C. Drew that he was to buy a parcel of land, to take the deed in his own name, and to execute a declaration that he held it in trust for the defendants, to pay a part of the consideration with money furnished by the defendants, and to give his own note and mortgage back for the balance thereof. The declaration also alleges that Drew purchased land of the plaintiff's wife and other persons; that he paid therefor \$10,000, with money furnished by the defendants; that the owners made a deed to him, and he, at their request, gave his note and a mortgage, containing a power of sale to the plaintiff; that the plaintiff foreclosed said mortgage by a sale; that, after applying the proceeds of the sale, there remains a balance due on said note; and that the defendants owe the plaintiff the said balance and the interest thereon.

The plaintiff contends that Drew throughout the transaction and in giving the note acted as the agent of the defendants; and that, as the note is not a negotiable promissory note, he has the right to maintain an action on it against them as unknown and undisclosed principals.

The general rule is well established that if an agent, acting for his principal, makes a contract without disclosing his principal, the latter is bound by the contract. *Thomson v. Davenport*, 2 Smith, Lead. Cas. (5th Am. Ed.) 358, and cases cited. He is bound because it is his contract made through another person. But this rule does not apply in the case at bar. Drew was not the agent of the defendants.

⁴² The last six cases are not cases of technical trusts. They are cases of "equities," so called, enforceable in a court of equity and conferring rights against property, superior to the rights of creditors as such. Instances of other "equities" conferring rights superior to the rights of creditors will be found in the following cases: *Wanzer v. Truly*, 17 How. 584, 15 L. Ed. 216 (1854); *Justice v. Justice*, 115 Ind. 201, 16 N. E. 615 (1888); *Loomis v. Hudson*, 18 Iowa, 416 (1865); *Wiggin v. Day*, 9 Gray (Mass.) 97 (1857); *Walton v. Hargroves*, 42 Miss. 18, 97 Am. Dec. 429 (1868); *Matter of Howe*, 1 Paige (N. Y.) 125, 19 Am. Dec. 395 (1828); *Williams v. Ingersoll*, 89 N. Y. 508 (1882); *Manifold's Estate*, *In re*, 5 Watts & S. (Pa.) 340 (1843); *Farmers' & Mechanics' Nat. Bk. v. King*, 57 Pa. 202, 98 Am. Dec. 215 (1868); *Burkholder v. Ludlam*, 30 Grat. (Va.) 255, 32 Am. Rep. 668 (1878).

He was not authorized to, and did not in fact, make any contract for and on behalf of them. He bought the land and took the title, he gave the note and the mortgage, in his own name and for his own behalf as trustee. The relations between him and the defendants were not those of agent and principal, but of trustee and cestuis que trust. Such a relation is lawful, and, in the absence of fraud, does not render the cestuis que trust liable to suits at law upon contracts made by the trustee in his own name.

It is true that the declaration alleges that Drew was the agent of the defendants. But it also alleges the specific facts which show the relations between the parties, and those facts show that he was not an agent. The allegations that he was an agent, must be regarded as mere allegations of a conclusion of law which are not sustained by the facts. The defendants' demurrer was therefore rightly sustained.⁴³

Exceptions overruled.

O'BRIEN v. JACKSON et al

(Court of Appeals of New York, 1901. 167 N. Y. 31, 60 N. E. 238.)

Action by Michael J. O'Brien against Henry H. Jackson and others, executors of the will of Peter A. H. Jackson. From a judgment of the appellate division, affirming a judgment in favor of plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

CULLEN, J.⁴⁴ This action was brought against the defendants, as executors of and trustees under the will of Peter A. H. Jackson, deceased, to recover a balance due on a contract for repairs made to some buildings of the testator, which were devised to the defendants on certain trusts. The complaint alleged that the defendants were the executors of and trustees under said will, and were authorized to make the agreement sued on. This allegation as to authority was put in issue by the answer. On the trial of the case the defendants moved to dismiss the complaint on the ground that it stated no cause of action against them in their representative capacity. This motion was denied. At the close of the evidence the motion was renewed on the same grounds, and again denied, to which rulings the defendants excepted. The case was then submitted to the jury on the issues relating to the performance of the contract and the plaintiff's claim for extra work. A verdict was rendered for the plaintiff, on which judgment was entered that the plaintiff recover of the defendants,

⁴³ The distinction here drawn seems to be one without a difference. The relation of agent and undisclosed principal, we submit, is that of trustee and cestui que trust, and a suit against the undisclosed principal on a contract made with his agent presents the anomaly of an action at law against the cestui que trust on a contract made with his trustee. See Ames' Cases on Trusts (2d Ed.) p. 258, note 1.

⁴⁴ A part of the opinion is omitted.

as executors of and trustees under the last will and testament of Peter A. H. Jackson, deceased, a specified sum, and that the plaintiff have execution therefor. The judgment having been affirmed by the appellate division, an appeal has been taken to this court.

We are of opinion that the action in its present form cannot be maintained, and the defendants' motion to dismiss the complaint as not stating a cause of action against them in their representative capacity should have been granted. The general rule is well settled in this state that executors or trustees cannot, by their executory contracts, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration, bind the estate, and thus create a liability not founded upon the contract or obligation of the testator. *Ferrin v. Myrick*, 41 N. Y. 315; *Austin v. Munroe*, 47 N. Y. 360; *Matter of Van Slooten v. Dodge*, 145 N. Y. 327, 39 N. E. 950; *Parker v. Day*, 155 N. Y. 383, 49 N. E. 1046. The reason for the rule is clearly explained by Hunt, C. J., in the earliest of the cases cited. While, as between the executor and the person with whom he contracts, the latter may rely on the contract, the beneficiaries are not concluded by the executor's act, but the propriety of the charge and the liability of the estate therefor must be determined in the accounting of the executor. In an action at law against the executor, the legatees and persons interested in the estate have no opportunity to be heard. To the general rule there are exceptions, and an equitable action can be maintained against the estate on behalf of a creditor in case of the fraud or insolvency of the executor, or when he is authorized to make an expenditure for the protection of the trust estate, and he has no trust fund for the purpose. In the latter case, if unwilling to make himself personally liable, he may charge the trust estate in favor of any person who will make the expenditure. Charges against the trust estate in such cases can be enforced only in an equitable action brought for the purpose. To that action the beneficiaries and cestuis que trustent are necessary parties. The trust estate cannot be depleted or swept away except in an action which they may defend. The defendants were personally liable on their contract with the plaintiff, but the action cannot be changed on this appeal into one against the defendants individually. *Austin v. Munroe*, *supra*. Any amendment of the pleadings or in the parties must be sought in the supreme court.

This action is in form at law, and has proceeded on that theory. The judgment is for the recovery of a sum of money, and authorizes the issue of an execution. But, while no action at law can be maintained against the defendants in their representative capacity, it may be that, if the complaint stated a good cause of action in equity, the defendants' motion to dismiss the complaint was properly denied, and the judgment might be suffered to stand for whatever it is worth in any subsequent proceedings the plaintiff should take to reach the trust

estate. The defendants did not take the objection at the trial, either by demurrer or answer, that their *cestuis que trustent* were not made parties to the action, and therefore cannot raise that objection now. But the difficulty is that the complaint did not allege facts sufficient to entitle the plaintiff to charge the trust estate in equity. It did not allege that the defendants were insolvent, or not amply personally responsible for the debt; nor did it state that the defendants were without funds sufficient to pay for the work contracted for.

It is said by the learned appellate division that the will authorized the executors to make the improvement for which the plaintiff seeks to recover. By his will the testator devised his residuary estate, real and personal, to his executors, in trust to hold the same in shares, and to apply the income of one share to each of his children during life, and upon the death of the child the testator devised the share to the issue or heirs at law of such child. He directed his executors to pay all taxes and assessments on his property, "keep the same insured, and in good repair and condition; if damaged, rebuilt; while held in trust by them, respectively, as aforesaid." The executors were authorized to sell certain pieces of real property with the consent of all his children, while as to the remainder of the real estate they were given no power of sale. The trustees were therefore empowered by the will to make the improvement out of which this action grows. Probably, the repairs being necessary, they would have the same power without express direction in the will. But the authority to incur the expense did not of itself create the right to run in debt for it, and pledge or mortgage the trust estate for the payment of the debt. Ordinarily, the cost of repairs should be borne by the income of the estate as it accrues. Extraordinary expenditures might, however, become necessary, which the income should not exclusively bear, or which might properly be apportioned between income to accrue in various years in the future.

The supreme court is now empowered by statute to authorize a sale or mortgage of the trust estate under proper circumstances and for sufficient reasons. But what is a proper charge on the estate, and how that charge should be apportioned and satisfied, are to be determined in proceedings between the trustee and his *cestui que trust*. Unless he is without trust funds sufficient for the purpose, he must act for himself in making expenditures, leaving the propriety of the expenditures to be determined in such proceedings. He can create a lien in favor of a third party only where the expenditures would otherwise necessarily involve an advance of his own funds. *Willis v. Sharp*, 113 N. Y. 586, 21 N. E. 705, 4 L. R. A. 493. * * *

Judgment reversed.

CLOPTON, Adm'r, v. GHOLSON and Others.

(Supreme Court of Mississippi, 1876. 53 Miss. 466.)

Appeal from the Chancery Court of Monroe County.

CHALMERS, J., delivered the opinion of the court.⁴⁵

In 1865-66 Haughton and McNairy, executors of T. Brandon, deceased, delivered for collection to Davis & Haughton (afterwards Davis, Haughton & Gholson), attorneys at law, a large mass of claims against various persons, amounting in the aggregate to something more than \$35,000. Upon all of them suits were instituted, which, in many instances, resulted in long and complicated litigation, involving injunctions in the Chancery and appeals to the Supreme Court. A large majority of the judgments obtained proved worthless, so that, after the appropriation by the attorneys of all the money realized, there still remained due them several thousand dollars for fees. The fees charged were proved to be usual and legitimate, according to the custom and standard at the Aberdeen bar. Both of the executors having resigned and subsequently died, the appellant Clopton was, in 1869, appointed administrator cum testamento annexo. One of the suits only seems to have been revived and prosecuted in his name, all the others having ripened into judgments before his appointment. The claim of the attorneys for their fees remaining unpaid, this bill was filed against the administrator Clopton in his representative capacity, to compel payment out of the assets in his hands. Many questions were raised by the pleadings below and by the assignment of errors in this court; but we shall notice only the principal one, which underlies and controls all others. Can an attorney make the estate of a decedent liable for services rendered to the executor or administrator in its management?

We had occasion in the recent case of *Fearn v. Mayers*, 53 Miss. 458, to declare that, while trustees have a lien on the trust estate for all costs and expenses legitimately incurred by them in its administration, this privilege does not extend to agents employed by them, but such agents must look alone to the trustee for reimbursement. It follows from this, that while the trustee who has paid or become responsible to parties legitimately employed by him in the business of the estate may retain the assets for his own reimbursement, yet if he does not do so, the parties employed by him are ordinarily powerless to assert any claim against the estate.

A careful re-examination of the subject has strengthened our conviction of the soundness of this decision, both on principle and authority. If the trust estate was liable to be attacked and impleaded by every person who had dealt with the trustee, and forced to litigate with them, the nature, value and beneficial character to the estate of the services alleged by them to have been rendered, it would

⁴⁵ A part of the opinion is omitted.

be involved in endless complications, and be perhaps swallowed up or seriously injured by the accumulations of costs. The law, therefore, compels such persons to look to the trustee with whom they dealt, and against whom alone they have a legal demand. If their claim is recognized or enforced against him, he presents it to the proper tribunal, and with him the beneficiaries of the estate will litigate the question of the propriety of its allowance against themselves. The authorities on this point are almost, if not altogether, uniform and harmonious. *Hill on Trustees*, 567; 2 *Perry on Trusts* (2d Ed.) § 907; *Lewin on Trusts*, 454, 455; *Worrall v. Harford*, 8 Ves. Jr. 4; *Jones v. Dawson*, 19 Ala. 672; *Wade v. Pope*, 44 Ala. 690; *Mulhall v. Williams*, 32 Ala. 489; *Livingston v. Gaussen*, 21 La. Ann. 286, 99 Am. Dec. 731; *Kessler v. Hall*, 64 N. C. 60; *Austin v. Munroe*, 47 N. Y. 360; *Guerry v. Capers*, Bailey, Eq. (S. C.) 159; *Sims v. Stilwell*, 3 How. (Miss.) 176; *Woods v. Ridley*, 27 Miss. 119.

It is evident that this principle applies with especial force to contracts entered into by executors and administrators. These functionaries have no authority to contract debts which shall primarily bind the estates committed to them, except in cases specially authorized by statute, and ordinarily such debts are obligatory only as personal obligations. This has been repeatedly held true of fees due attorneys for professional services in the management of estates, as was declared in the leading case of *Worrall v. Harford*, *ubi supra*, and in several of the other cases above cited.

It is true that, under some circumstances, attorneys or other creditors of the administrator may, under the principles of substitution and subrogation, reach the assets of the estate; but such relief must be based on the fact that the administrator himself either already has some claim against the estate, or would be entitled to one by a payment of the demand of the creditor, and that the latter is unable to obtain satisfaction from the administrator. If, for instance, the creditor can show that the consideration of his demand inured to the benefit of the estate, and is unpaid; that the administrator is nonresident or insolvent; has never received credit for it in his settlements; and that the estate is indebted to him,—in such case the creditor may, by a bill in chancery, have himself subrogated to the rights of the administrator against the estate, and to that extent have satisfaction of his demand out of its assets. Nor would it be necessary for him to show that the estate was actually indebted to the insolvent administrator. It would be sufficient if he could show that the estate would have been indebted if the administrator had paid the demand out of his private funds. Inasmuch as in such a case the administrator ought to have paid it, and if he had done so, would have been allowed a credit against the estate, a court of equity will consider that done which should have been done, and will give the creditor a decree against the estate, provided the administrator is not indebted to the estate, or would not thereby become so, and has not already received

credit for the claim. Under such circumstances the creditor would obtain payment only for beneficial services rendered to the estate, while it would be in no wise damaged.

The Supreme Court of South Carolina, in *Guerrey v. Capers*, Bailey, Eq. 159, after laying down, in the broadest terms, the doctrine that the creditor must look alone to the administrator with whom he contracted, thus announces the principle above stated: "Whenever the trustee, if he had paid the debt out of his own funds, would be in advance to the trust estate, and would be entitled to be reimbursed out of it, his creditor may, if the trustee is insolvent, be allowed to take his place, and be paid out of the estate to the same extent. This constitutes, however, the only exception to the general rule which we are prepared to recognize." This, we think, announces the true rule, except that the court omits the contingency of the estate being already indebted to the trustee, in which event, of course, the equity would be still stronger.

This right of subrogation is not to be confounded with that intimated in *Woods v. Ridley*, 27 Miss. 119, and more fully exemplified in *Short v. Porter*, 44 Miss. 533, where parties had furnished money to the administrator which had been applied in exoneration of the debts of the estate. In such cases the equities arise by reason of the application of the money to the discharge of the burdens resting upon the estate, and are in no manner affected by the solvency or insolvency of the administrator, or by the state of the accounts between himself and the estate. In the class of cases under consideration the creditor has no debt against the estate, nor has he discharged any. He has a personal claim against the administrator, which he will be allowed to assert against the estate under the limitations above indicated, because the estate has received the benefit of the consideration, and has not paid for it; and while it is impossible to collect it from the party primarily liable, its payment out of the assets can inflict no injustice upon the beneficiaries of the estate.

Whether under any circumstances such a proceeding can be instituted against the estate, before the administrator with whom the contract was made has been pursued to insolvency, is a mooted question. It was ruled in the affirmative in *Coopwood v. Wallace*, 12 Ala. 790; but this decision was overruled in *Jones v. Dawson*, 19 Ala. 672, Chief Justice Dargan dissenting. The latter decision was undoubtedly correct in the principal question discussed, to wit, the non-liability of the trust estate to the claims of parties dealing with the trustee, in discussing which the court remarked: "We say nothing of the right of the party, after he has exhausted his legal remedy against the trustee, to proceed in equity to subject an equitable demand which the trustee may have against the estate."

Conceding that the party has this right, as we have decided above that he has, we see no reason why he should not be allowed to assert it primarily, without being put to the necessity of a suit at law in the

first instance. In such a proceeding he must assume the burden of showing the impossibility of obtaining payment from the administrator, as well as of establishing all the other facts necessary to maintain the suit. The administrator or his legal representatives should be made a defendant, as well as the existing representative of the estate proceeded against.

The bill in this case possesses none of the features deemed essential to its maintenance; and the demurrer filed to it should have been sustained. * * *

Decree reversed.

FEARN v. MAYERS, Trustee, and Others.

(Supreme Court of Mississippi, 1876. 53 Miss. 458.)

Appeal from the Chancery Court of Hinds County; Hon. H. R. Ware, Chancellor.

In this suit a bill was filed to subject certain lands held in trust to the payment of services rendered by an agent employed by the trustees to take care of and manage the trust estate. A demurrer was filed to the bill, which was overruled, and the defendants were required to plead; and an order of reference to a commissioner was made, to have an account stated between the trustees and their agent. But the Chancellor, who overruled the demurrer, went out of office; and the new Chancellor, upon final hearing, dismissed the bill for want of jurisdiction of the matters and things therein set forth. The complainant appealed to this court, and assigned for error the action of the Chancery Court in dismissing the bill.

CHALMERS, J.⁴⁶ In 1842, William P. Bibb, David P. Bibb, Robert T. Bibb, and Archibald E. Mills conveyed in trust to Thomas Bibb and A. M. Hopkins a large amount of real and personal property, situated in the States of Alabama, Mississippi, and Louisiana, for the purpose of liquidating certain liabilities therein specified. When these debts had been extinguished, the surplus property remaining was to be reconveyed to the grantors, or sold for division of the proceeds among them, as might then be deemed advisable.

Under a special authorization contained in the conveyance, the trustees appointed George Fearn their agent to look after and manage so much of the property as was situated in Mississippi, at a stipulated salary. There was a full settlement between Fearn and the trustees in 1859, by which a small balance was found due him; and after that period very little was done in furtherance of the trust, the debts intended to be secured by it having been mostly liquidated. Fearn, however, remained in charge of the Mississippi property, giving it needful attention, until 1868, when he was adjudged a bankrupt. At the sale of his effects by his assignee, the complainant Mary C. Fearn

⁴⁶ A part of the opinion is omitted.

became the purchaser of his claim against the trustees, for salary and moneys expended in his agency. The original trustees having died, and the appellee Mayers having been appointed in their stead, by the Chancery Court of Alabama, in which State the parties in interest principally resided, Mary C. Fearn filed this bill against said new trustee, and against the children and representatives of the original grantors in the trust deed, for the purpose of subjecting the corpus of the trust estate, situate in this State, to the satisfaction of the amount due to her as assignee of George Fearn. * * *

Can a lien for this amount be asserted against the body of the trust estate?

It seems well settled, that while trustees have a lien on the trust fund for all costs and expenses legitimately incurred by them in its administration, this privilege does not extend to agents employed by them, but such agents must look alone to the trustees for reimbursement. *Hill on Trustees*, 567; 2 *Perry on Trusts* (2d Ed.) § 907; *Jones v. Dawson*, 19 Ala. 672. This principle is not disputed by the complainant as a general proposition, but it is insisted that a different rule must prevail here, because by the instrument creating the fund the expenses of administering it were expressly made chargeable upon the estate, and the trustees were given authority to appoint such agents, who might "do anything which the said grantees [trustees] could do in execution of the trusts of said deed."

It is sufficient to remark that, without any stipulation to that effect, the expenses of administering a trust are always chargeable upon the trust fund, and that every appointment of a trustee or agent to transact an extended and complicated business carries with it the power to employ suitable sub-agents; so that the enumeration of these things in the conveyance in this instance was unnecessary. But yet it was in this very class of cases, where the imposition upon the estate of the expenses properly incurred by the trustee, and his power to employ agents or attorneys, were unquestioned, that the rule denying to such employés a lien on the estate was established. In none of them was any question raised as to his power of employing such agents, or as to the liability of the estate for the cost of administering the trust. It is impossible to see, therefore, how the insertion of the provision in question can change the rule of law, in the absence of an express declaration in the instrument that the estate shall be liable for all costs and charges incurred by or owing to the sub-agents of the trustees. * * *

The complainant in the case at bar, having no lien upon the trust estate, is without standing in a court of chancery. The action of the court below in dismissing the bill is affirmed.⁴⁷

⁴⁷ See *Worrall v. Harford*, 8 Ves. Jr. 4 (1802); *Strickland v. Symons*, L. R. 26 Ch. Div. 245 (1864).

NORTON and Others v. PHELPS and Wife.

(Supreme Court of Mississippi, 1877. 54 Miss. 467.)

Appeal from the Chancery Court of Washington County.

On April 17, 1869, M. O. H. Horton & Co. filed this bill against A. J. Phelps and his wife Mary B. Phelps, formerly Vick, to subject a plantation in their possession to an account for supplies and money advanced to Henry W. Vick and Jonathan Pearce, trustee, for the plantation, Henry W. Vick, and Mary B. Vick, the cestui que trust. The trustee Pearce was not made a party to the suit until 1870. In 1850, Sarah Vick conveyed the plantation to Pearce in trust, as indicated in the opinion. Henry W. Vick having died in April, 1861, Pearce took possession of the place in the following June, and became guardian of Mary B. Vick, the cestui que trust. On Nov. 28, 1865, Pearce, as guardian and trustee, exhibited to the Probate Court his account, showing that the estate was indebted to him \$3,000, and to Norton & Co., \$10,000, composed of \$6,000 contracted by Henry W. Vick, and \$4,000 contracted by himself in the course of his guardianship. This account, having been exhibited to Mary B. Vick after she became of age and before she married, was approved by her; and Pearce being discharged as guardian, surrendered the plantation to her, and became a non-resident of this State. On October 3, 1866, Norton & Co. rendered Pearce an account of that date, showing a balance of \$7,631.16, which he admitted to be "correct, due and owing." This account was exhibited to Mary B. and A. J. Phelps, who admitted it to be a proper charge against them, and a liability for which the trust estate was bound. The complainants appealed from a final decree on the merits dismissing the bill.

CAMPBELL, J., delivered the opinion of the court.⁴⁸

In the case of Clopton v. Gholson, 53 Miss. 466, we announced the principles applicable to this case. These are, that persons dealing with a trustee must look to him for payment of their demands, and that, ordinarily, the creditor has no right to resort to the trust estate to enforce his demand for advances made or services rendered for the benefit of the trust estate. But while this is the rule, there are exceptions to it, and where expenditures have been made for the benefit of the trust estate, and it has not paid for them, directly or indirectly, and the estate is either indebted to the trustee, or would have been if the trustee had paid, or would be if he should pay the demand, and the trustee is insolvent or nonresident, so that the creditor cannot recover his demand from him, or will be compelled to follow him to a foreign jurisdiction, the trust estate may be reached directly by a proceeding in chancery. The principle is that, while persons dealing as creditors with the trustee must look to him personally, and not to the trust estate, yet where the estate has received the benefit of ex-

⁴⁸ A part of the opinion is omitted.

penditures procured to be made for it by the trustee, and it has not in any way borne the burden of these expenditures properly chargeable to it, and to fasten the charge upon it will do it no wrong, but simply cause it to pay what it is liable for to the trustee, or would be liable for if he had paid it, or should pay it, and because of the insolvency or non-residence of the trustee, our tribunals cannot afford the creditor a remedy for his demand, he may proceed directly against the trust estate, and assert against it the demand the trustee could maintain if he had paid or should pay the claim, and should himself proceed against the trust estate. Generally the trustee alone must be looked to. He stands between the creditor and the estate. He represents the estate, and deals for it. He is entitled to be reimbursed out of the trust estate for all disbursements rightfully made by him on account of it, and creditors must get payment from him; but when they cannot do that, and it is right for the trust estate to pay the demand, and it owes the trustee, or would owe him if he had paid or should pay the demand, the rule, founded in policy, which denies the creditor access to the trust estate, yields to the higher considerations of justice and equity; and, in order that justice may be done, the creditor may be substituted, as to the trust estate, to the exact position which the trustee would occupy if he had paid or should pay the demand, and seek to obtain reimbursement out of the estate. Applying these principles to the facts of this case, it will be found that they bring it within the exception stated.

Clearly, if Pearce, the trustee, had paid, or should pay, under a recovery against him, the demand sought to be enforced against the trust estate, he would be a creditor of the estate. He is a non-resident of the State of Mississippi, where the trust property is and where the debt was contracted, and the creditor has the same rights, because of this, as to the trust property, as if Pearce was insolvent. The reason why insolvency of the trustee is an element in the combination of circumstances admitting the creditor to proceed against the trust estate is because of the inability of the creditors to coerce an insolvent person to pay his liabilities; and the same considerations apply, ordinarily, in case of the non-residence of the trustee, without regard to his pecuniary condition; for a creditor seeking the aid of our courts should not be dismissed because he might pursue a person to a foreign land, and there have a recovery against him. If he cannot obtain justice through our courts except by departing in an exceptional case from a rule of policy, to secure justice the departure should be made. "Trustees have an inherent right to be reimbursed all expenses properly incurred in the execution of the trust, and no express declaration in the trust instrument is requisite to create the right." *Hill on Trustees*, 570 et seq.; 2 *Perry on Trusts*, § 910. The trust deed in this case vests the title of the property in Pearce, as trustee, providing that he "is to permit the said Henry W. Vick, as agent for said trustee, * * * to superintend, possess, manage and

control said property," etc., "with power to sell and exchange," etc. This conferred very large powers for incurring expenditures to be borne by the trust estate. *Hill on Trustees*, 571, 572. Vick was thus constituted the agent of the trustee for the very purpose of possessing, managing and controlling the trust property. Debts properly made by Vick, agent and co-trustee, as he is elsewhere in the deed called, in the management of the trust property, were the debts of Pearce, the trustee, with this qualification, viz., that he is exempted by the deed from responsibility personally for the acts or conduct of Vick.⁴⁹ * * *

Decree reversed and cause remanded.

Ex parte GARLAND.

(In Chancery, before Lord Chancellor Eldon, 1804. 10 Vesey, Jr. 110.)

Henry Ballman by his will, dated the 17th of February, 1798, after directing his debts, etc., to be paid, bequeathed all his leasehold and personal estates to his wife Margaret Ballman, and three other persons, their respective executors, etc., upon trust to permit Margaret Ballman to receive the rents, interest, etc., for her life, or until she should marry again, for her own use, and the support, maintenance, and education, of his five children, until they should respectively attain the age of 21, subject to certain payments to his children as after mentioned; and from and after the death and second marriage of his wife in trust for all and every or such one or more of his said children or their issue, and in such shares, manner, and form, as she should appoint by any deed or instrument in writing or by her will; and for want of such appointment and as to such parts, of which no such appointment should be made, in trust for all his children, their respective executors, etc., equally to be assigned, paid and transferred, at their respective ages of 21, with survivorship in case of the death of any under that age; and in case of the deaths of all under that age without leaving issue then to pay, etc., his said personal estate to Margaret Ballman, her executors, etc.

⁴⁹ *Habersham v. Huguenin*, R. M. Charl. (Ga.) 376 (1832); *Wylly v. Collins*, 9 Ga. 223 (1851); *Malone v. Buice*, 60 Ga. 152 (1878); *Cater v. Eveleigh*, 4 Desaus. (S. C.) 19, 6 Am. Dec. 596 (1809); *James v. Mayrant*, 4 Desaus. (S. C.) 591, 6 Am. Dec. 630 (1815); *Montgomery v. Eveleigh*, 1 McCord, Eq. (S. C.) 267 (1826); *Douglas v. Fraser*, 2 McCord, Eq. (S. C.) 105 (1827); *Guerry v. Capers, Bailey, Eq.* (S. C.) 159 (1830); *Manigault v. Deas, Bailey, Eq.* (S. C.) 283, 290 (1831); *Henshaw v. Freer, Bailey, Eq.* (S. C.) 311, 317, 318 (1831); *Magwood v. Johnston*, 1 Hill, Eq. (S. C.) 228 (1833); *Tennant v. Stoney*, 1 Rich. Eq. (S. C.) 222, 44 Am. Dec. 213, 243 (1845); *Owens v. Mitchell*, 38 Tex. 588 (1873).

Most of the cases here cited recognize the principle that the creditor of the trustee cannot recover against the trust estate so long as the trustee is a defaulter to the trust. *Wylly v. Collins*, 9 Ga. 223 (1851), and *Manderson's Appeal*, 113 Pa. 631, 6 Atl. 893 (1866), are contra.

See article by Louis D. Brandeis, 15 Am. Law Rev., 449.

The testator then directed his trustees to pay to his children respectively, as they should attain 21, £400. apiece out of his personal estate; and he farther directed, that his trade of a miller and the farming business, then carried on by him, should be carried on by Margaret Ballman, until his trustees should think proper to establish his sons or either of them therein; and he directed his trustees upon so settling his sons or either of them in the business to permit them to take off the stock, crop, and other effects in the said business at a fair valuation, and to take a bond or note from them for the amount, payable by such instalments as his trustees would think reasonable, with interest in the meantime at 4 per cent. He also directed, that as long as the businesses should be carried on by his wife, the profits thereof should be applied for her own use and for the maintenance and education of his children; and that an inventory and valuation of his stock, crop and effects, in his said businesses, should be taken within six weeks after his decease; and that any sum or sums, not exceeding £300., which by a codicil he increased to £600., should be paid by his trustees to Margaret Ballman out of his personal estate for the purpose of enabling her to carry on the said businesses; and that she should give notes of hand to the other trustees for the sums so advanced to her and the amount of the valuation. He appointed his widow and the other trustees his executors.

After the death of the testator Margaret Ballman carried on the trades till December, 1801; when she became bankrupt. The other trustees had according to the directions of the will advanced her the sum of £600.; and the stock and effects were valued at £1,351. 5s.; for which she gave two notes to the other trustees. At the time of her bankruptcy she was indebted to the trustees in respect of those two notes, and also in £768. 12s. 4d. of the testator's assets received by her. The surviving trustee proved under the commission the three sums of £1,351. 5s., £600., and £768. 12s. 4d.

The petition was presented by the assignees under the commission; praying, that the proof may be expunged; and the dividends refunded; and that it may be declared, that the whole of the personal estate of the testator is liable to all the debts contracted by the bankrupt in carrying on the trades of a miller and farmer under the directions of the will.

When the petition was first heard, two points were made for the assignees: 1st, that the surviving trustee, as a creditor on the notes, ought to be postponed to all the other creditors of the bankrupt; 2dly, that the general assets of the testator were subject to the bankruptcy.

On the first point, the Lord Chancellor immediately expressed a clear opinion in favor of the assignees. The second His Lordship considered a point of great importance; and directed a farther argument.

THE LORD CHANCELLOR. In the case before Lord Kenyon the important difficulties that have been urged upon this occasion, were not

submitted to the Court. Certainly, Lord Kenyon developed the reasons upon which he drew the conclusion in that case, in a very limited degree, if at all. The question really goes to this: Whether this Court is to hold, that, where a testator directs a trade to be carried on, and without limitation, all the other purposes of his will are to stand still, or all the administration under it to be checked, that every person taking is in effect to become a security in proportion to the property he takes, and to the extent of all time, for the trade which the testator has directed to be carried on. The inconvenience would be intolerable; amounting to this; that every legatee is to hold his legacy upon terms, connected with transactions, by which he cannot benefit, which he cannot control, and which may cut down all his hopes; as far as they are founded upon his receipt of that bounty. On the other hand, the case of the executor is very hard. He becomes liable, as personally responsible, to the extent of all his own property; also, in his person; and as he may be proceeded against as a bankrupt; though he is but a trustee. But he places himself in that situation by his own choice; judging for himself, whether it is fit and safe to enter into that situation, and contract that sort of responsibility. The creditors of the testator must be either those, whose debts were contracted before his death, or persons, who have become creditors of the trade after his death. If they are creditors of the former description, they have the power and the means of calling forth after the testator's death the whole of his property, in discharge of their demands; and, if they do not put an end to that relation, but permit the representative to act, they have perhaps no more reason to complain of a decision, more limited than that of Lord Kenyon, than they would have, if by their own conduct they permitted part of the assets to get to the hands of persons, from whom they could not draw them; and they relied upon his liability.

As to creditors, subsequent to the death of the testator, in the first place, they may determine, whether they will be creditors. Next, it is admitted, they have the whole fund that is embarked in the trade; and in addition they have the personal responsibility of the individual, with whom they deal; the only security in ordinary transactions of debtor and creditor. They have something very like a lien upon the estate, embarked in the trade. They have not a lien upon anything else; nor have creditors in other cases a lien upon the effects of a person, with whom they deal; though, through the equity, as to the application of the joint and separate estates to the joint and separate debts respectively, they work out that lien. If it is to be determined upon the convenience, it is not so inconvenient to say, those, who deal with the executor, must take notice, that the testator's responsibility is limited by the authority given the executor, as to say, on the other hand, that, the executor being authorized to carry on that trade, making from day to day a great variety of engagements, or, as it has been put, entering into one great and important engagement, but also

authorized by the will to do many other acts, which he must equally do in a due administration under the will, wherever for the benefit of one child the trade is directed to be carried on, all the other objects of the will must at any distance of time be considered, to the extent of the property they take, security for the creditors on the trade.

Such a decision was never made previously to *Hankey v. Hammock*. I am not aware, that such a decision has ever been made since that case. We may recollect cases not consistent with the supposition, that the law is according to that decision. It is necessary to look into other cases, from which it may appear, that it was not present to the mind of the court, that there was such a rule. The difficulty also, that must exist in a variety of instances, is to be considered; the case, that has been put, where a tradesman directs the trade to be carried on for the benefit of a son, giving him a legacy of £50,000. It is difficult to say, that legacy must not be liable; and yet it is very difficult to say, it shall be liable consistently with saying legacies to others shall not; unless upon this, that the legacy is given by the same will, for the benefit of the same person, who is to have the benefit of the trade; and yet I do not know, that is a principle of decision, by which I can abide. But, in the ordinary case, the eldest son, made residuary legatee and executor, and ordered to carry on the trade for the benefit of another child, cannot possibly withdraw his residuary legacy from the liability the trade carried on would impose upon him personally; for he makes himself personally liable; and therefore with reference to the property, taken from his father, though not liable as legatee, he becomes liable, as a person carrying on the trade; his legacy assisting the means of his responsibility in carrying on the trade. That person, therefore, both legatee and executor, must answer for his acts as to the trade. Then why should not another legatee? The answer is, that person is liable, not as legatee; but upon the ground that the property is part of his general substance, and he may spend it, notwithstanding his liability as executor. So may another legatee; but the power of spending his general substance shows, there is no great convenience in this doctrine.

In this case, I fear, I shall be under the necessity of contradicting the authority of a judge I most highly respect; feeling a strong opinion, that only the property declared to be embarked in the trade, shall be answerable to the creditors of the trade. If I am not bound by decision, the convenience of mankind requires me to hold, that the creditors of the trade, as such, have not a claim against the distributed assets, in the hands of third persons under the direction of the same will, which has authorized the trade to be carried on for the benefit of other persons.

Aug. 13th, The LORD CHANCELLOR. My opinion upon this case is, that it is impossible to hold, that the trade is to be carried on, perhaps for a century; and at the end of that time the creditors, dealing with that trade, are, merely because it is directed by the will to be carried

on, to pursue the general assets, distributed perhaps to fifty families.

The order was, that the proof should stand in respect of the sum of £768. 12s. 4d.; without prejudice to filing a bill.⁵⁰

No bill was filed.

In re JOHNSON.

SHEARMAN v. ROBINSON.

(High Court of Justice, Chancery Division, 1879. *Law Reports 15 Chancery Division*, 548.)

Adjourned Summons:

Peter Johnson, by his will, dated the 27th of May, 1873, appointed the defendant Robinson and another his executors; and, after making certain specific and pecuniary bequests, and directing the payment of his debts, and funeral and testamentary expenses, he directed his executors, as soon as might be after his decease, to collect, get in and receive all debts owing to him in respect of the business of a tailor and robe-maker then carried on by him at Cambridge, and also all other debts owing to him not connected with the business then carried on by him in London in partnership with Thomas Sadler, and (subject to the provisions thereafter contained) to sell and convert into money all his Cambridge stock in trade, and stand possessed of the proceeds, and all other his personal estate and effects whatsoever (except his share and interest in the London business) not thereinbefore specifically bequeathed, upon trust to pay one equal fourth part thereof to and amongst such of the children of his deceased sister Catherine Neill (including his nephew John Neill) as should be living at the time of his decease; one other equal fourth part to the plaintiff; and the remaining two fourth parts to the several persons therein named. And the testator declared that in case his nephew John Neill

⁵⁰ *Ex parte Richardson*, 3 *Mad.* 138 (1818); *Thompson v. Andrews*, 1 *M. & K.* 116 (1832); *Cutbush v. Cutbush*, 1 *Beav.* 184 (1839); *Ex parte Butterfield*, *De G.'s Bkpty. Rep.* 570 (1847); *McNeillie v. Acton*, 4 *De M. & G.* 744 (1853); *Ex parte Westcott*, *L. R.* 9 *Ch. App. Cas.* 626 (1874); *Fairland v. Percy*, *L. R.* 3 *P. & D.* 217 (1875); *Owen v. Delamere*, *L. R.* 15 *Eq.* 134 (1871); *Burwell v. Cawood*, 2 *How. (U. S.)* 560, 11 *L. Ed.* 378 (1844); *Smith v. Ayer*, 101 *U. S.* 320, 25 *L. Ed.* 955 (1879); *Jones v. Walker*, 103 *U. S.* 444, 26 *L. Ed.* 404 (1880); *Cook v. Adm'r of Rogers (C. C.)* 3 *Fed.* 69 (1880); *Edgar v. Cook, Adm'r*, 4 *Ala.* 588 (1843); *Alzheimer v. Hunter*, 56 *Ark.* 159, 19 *S. W.* 496 (1892); *Pitkin v. Pitkin*, 7 *Conn.* 307, 18 *Am. Dec.* 111 (1828); *Blodgett v. Am. Nat. Bk.*, 49 *Conn.* 9 (1881); *Wilson, Ex'x, v. Fridenberg*, 21 *Fla.* 386 (1885); *Stanwood v. Owen, Adm'r*, 14 *Gray (Mass.)* 195 (1859); *Hagan v. Barksdale*, 44 *Miss.* 186 (1870); *Brasfield v. French*, 59 *Miss.* 632 (1882); *Laible v. Ferry*, 32 *N. J. Eq.* 791 (1880); *Willis v. Sharp*, 113 *N. Y.* 586, 21 *N. E.* 705, 4 *L. R. A.* 493 (1889); *Stewart v. Robinson*, 115 *N. Y.* 328, 22 *N. E.* 160, 163, 5 *L. R. A.* 410 (1889); *Adams v. Albert*, 155 *N. Y.* 356, 49 *N. E.* 929, 63 *Am. St. Rep.* 675 (1898); *Lucht, Adm'r, v. Behrens*, 28 *Ohio St.* 231, 22 *Am. Rep.* 378 (1876); *Gratz v. Bayard*, 11 *Serg. & R. (Pa.)* 41 (1824); *Mathews v. Stephenson*, 6 *Pa.* 496 (1847); *Laughlin v. Adm'r of Lorenz*, 48 *Pa.* 275, 86 *Am. Dec.* 592 (1864); *Davis v. Christian*, 15 *Gratt. (Va.)* 11 (1859).

should be under the age of twenty-one years at the time of his decease, it should be lawful for his said executors, upon the request of the said John Neill, to postpone the sale of his Cambridge stock in trade and allow his said business of tailor and robe-maker at Cambridge to be carried on by the said John Neill for his own benefit under the supervision of his said executors until such time as the said John Neill should attain twenty-one, and during such period should use such part of the share of the said John Neill in his residuary personal estate as might be requisite for the due carrying on of the said business. And he directed, in case that provision was carried into effect, that an inventory and valuation of all his stock in trade at Cambridge should be taken immediately after his decease, and that on the said John Neill attaining his age of twenty-one years he should have the option of taking the then existing stock at the amount of such valuation, and that if he declined to do so, and the said stock was sold, then the said John Neill should bring the amount of the proceeds of such sale into hotchpot on the calculation for the distribution of the residuary personal estate. The testator then gave certain directions as to the winding-up of his partnership in the London business, and directed that his share and interest therein should fall into his residuary personal estate.

The testator died on the 25th of November, 1875, and his will was proved by the defendant Robinson alone, the other executor having renounced. There were living at the testator's death two children of his deceased sister Catherine, one of whom was the said John Neill, then an infant.

After the testator's death the defendant did not get in the book debts of the Cambridge business as directed by the will, but he continued to carry on the business in his own name until the 30th of June, 1878, when John Neill attained twenty-one; he also continued the management of the testator's share in the London business. For the purpose of carrying on the Cambridge business, the defendant advanced from time to time several sums of money out of John Neill's share in the testator's personal estate, which sums were repaid out of the business in the ordinary course of carrying it on, but the defendant kept no separate banking account for the business.

An action having been instituted by one of the residuary legatees, and a judgment obtained for the administration of the testator's estate, it was found, on taking the defendant's accounts, that there was due from him a balance of £764. 16s. 1d. in respect of profits from the Cambridge business, and also a balance of £1,668. 3s. 1d. in respect of the general personal estate of the testator, including his share in the London business.

Amongst the creditors who made claims against the estate under the judgment were several persons who had supplied the defendant with goods in the course of his carrying on the Cambridge business subsequently to the testator's death, but these claims being disallowed

by the chief clerk, summonses were taken out by three of these creditors for the purpose of establishing their claims. One of the summonses was by a firm of Standen & Co., woollen warehousemen, and asked that a sum of £460. 5s. 10d. due to them for goods sold and delivered to the defendant, the executor, in the course of his carrying on the trade or business of a tailor from the time of the testator's death down to the 30th of June, 1878, might be forthwith paid to them by the said executor out of the share of the said John Neill in the testator's residuary personal estate; or otherwise that it might be declared that the applicants were entitled to a lien on the portion of the estate of the said testator which on the 30th of June, 1878, was embarked in the carrying on as aforesaid of the said testator's business; and that an inquiry might be directed for the purpose of ascertaining what were the assets of the said testator which were so subject to the lien of the applicants.

The two other summonses, which were by creditors for an aggregate amount of upwards of £600., asked that they might be at liberty to bring in their claims against the assets of the business carried on by the defendant under the powers of the will, in respect of debts incurred by him to the applicants in the course of such business, and that such assets might be applied in payment of what should be found due to the applicants in respect of their debts. Upon the further consideration of the action all three summonses came on for hearing.

It appeared that the defendant, the executor, was insolvent.

JESSEL, M. R. I shall dismiss these summonses, but I will give the creditors liberty to present a petition. I will not distribute the assets until they have presented a petition; that seems to me the regular course, but at present I do not see that they are entitled to anything. That seems to have been the course taken in several cases, and I think it is the right course, for the creditors are not parties to this suit at all. They ought to come in under a petition. With regard to the point that has been argued, I understand the doctrine to be this, that where a trustee is authorized by a testator, or by a settlor—for it makes no difference—to carry on a business with certain funds which he gives to the trustee for that purpose, the creditor who trusts the executor has a right to say, "I had the personal liability of the man I trusted, and I have also a right to be put in his place against the assets; that is, I have a right to the benefit of indemnity or lien which he has against the assets devoted to the purposes of the trade." The first right is his general right by contract, because he trusted the trustee or executor; he has a personal right to sue him and to get judgment and make him a bankrupt. The second right is a mere corollary to those numerous cases in equity in which persons are allowed to follow trust assets. The trust assets having been devoted to carrying on the trade, it would not be right that the *cestui que trust* should get the benefit of the trade without paying the liabilities; therefore the court says to him, You shall not set up a trustee who may be

a man of straw, and make him a bankrupt to avoid the responsibility of the assets for carrying on the trade; the court puts the creditor, so to speak, as I understand it, in the place of the trustee. But if the trustee has wronged the trust estate, that is, if he has taken money out of the assets more than sufficient to pay the debts, and instead of applying them to the payment of the debts has put them into his own pocket, then it appears to me there is no such equity, because the *cestuis que trust* are not taking the benefit. The trustee having pocketed the money, the title of the creditor, so to speak, to be put in the place of the trustee, is a title to get nothing, because nothing is due to the trustee. It does not appear to me that in that case the creditor, who has never contracted for anything, who has only got the benefit of this equity, if I may say so, by means of the trustee, through the lucky accident of there being a trust, ought to be put in a better position than any other creditor. I do not see that any judge has said so.

If we start with *Ex parte Garland* [10 Ves. Jr. 110], what Lord Eldon says is this [page 120]: "It is admitted, they [the creditors] have the whole fund that is embarked in the trade"—that is, as between themselves and the executors the creditors can claim the application of the fund—"and in addition they have the personal responsibility of the individual with whom they deal; the only security in ordinary transactions of debtor and creditor." [His Lordship then read down to the words "security for the creditors on the trade" (Id. 121), and continued:] Then [page 122], after expressing his strong opinion that only the property declared to be embarked in the trade should be answerable to the creditors of the trade, he says: "If I am not bound by decision, the convenience of mankind requires me to hold, that the creditors of the trade, as such, have not a claim against the distributed assets, in the hands of third persons under the direction of the same will, which has authorized the trade to be carried on for the benefit of other persons." That does not decide the point I have mentioned at all. All that it decides is that the claim of the creditors is limited to the assets devoted to trade. What their right against those assets is, Lord Eldon does not decide.

Then we have a case which I think comes nearest to the present case, *Ex parte Edmonds* [4 De G., F. & J. 488]. Lord Justice Turner says this [page 498]: "The case of *Ex parte Garland* and the other cases referred to in the argument have not, in my opinion, any application to the present case. They proceed upon the principle that the executor or trustee directed to carry on the business having the right to resort for his indemnity to the assets directed to be employed in carrying it on, the creditors of the trade are entitled to the benefit of that right, and thus become creditors of the fund to which the executor or trustee has a right to resort."

Having read those two authorities, which, being decisions of a Lord Chancellor and of the Court of Appeal in Chancery, would be binding on me, I need only say that I do not think the point arises in any of the

subsequent cases, or was the subject of consideration in them. *Owen v. Delamere* [L. R. 15 Eq. 134], which contains a mere dictum of Vice-Chancellor Bacon, but still of course entitled to great respect, if it did differ—which I do not think it does—from what Lord Justice Turner laid down in *Ex parte Edmonds* as the true principle, would not be binding upon me; but I do not think it is different, because Vice-Chancellor Bacon is directing his attention to the point decided in *Ex parte Garland*, that is, that the creditors have no right to go beyond assets devoted to trade. The nature of the right as against those assets is not adverted to; that is plain; for after saying that *Ex parte Garland* “contains a clear, distinct, and luminous exposition of the law on the subject”—which it does upon the point that it is not the general estate of the testator which is liable, but only so much as he has authorized to be employed in the business—the Vice-Chancellor says [page 139]: “The court will give effect to the trust which has been created by the testator, and will keep separate and applicable only to purposes of the trust that estate which the testator designated and directed to be employed for that purpose.” It is merely repeating *Ex parte Garland* without the slightest reference to the mode in which the claim is to be enforced.

The same may be said of the case of *Fairland v. Percy* [L. R. 3 P. & D. 217]. I dispose of that by saying that Sir James Hannen goes no further, and that he does not consider the second point at all.

The question raised by the second point—that is, what is the right to resort—is not treated of, as far as I can see, in any reported decision except in the case of *Ex parte Edmonds*. I think it is inferentially referred to in Mr. Justice Lindley’s book, where I think he means to say the same that Lord Justice Turner said, although I must say, with great deference to Mr. Justice Lindley, it might have been more clearly put. Nothing can be clearer than the way in which Lord Justice Turner puts it; it is simply, as he says, the right to resort for indemnity to the assets actually directed to be employed; and the creditor is entitled to the benefit of that right.

What Mr. Justice Lindley says is this [Lindley on Partnership (3d Ed.) p. 1103]: [His Lordship then read the passage commencing “If an executor of a deceased partner,” and ending “lien on the assets of the deceased employed therein,” and continued:]

I am not sure that Mr. Justice Lindley had in view the remarks of Lord Justice Turner in *Ex parte Edmonds*, for he does not cite the case; but he may have arrived at the same conclusion independently.

The only other text-book that I have been looking at on this point is the last edition of Williams on Executors [8th Ed., p. 1798]. After stating that a trade is not transmissible, but is put an end to by the death of the trader, it says: “Executors, therefore, have no authority in law to carry on the trade of their testator, and if they do so, unless under the protection of the Court of Chancery, they run great risk, even although the will contains a direction that they should continue

the business of the deceased." Then it says [p. 1800]: "The testator may, by his will, qualify the power of his executor to carry on trade, and limit it to a specific part of the assets, which he may sever from the general mass of his property for that purpose; and then in the event of the bankruptcy of the executor, the rest of the assets will not be affected by the commission, although the whole of the executor's private property will be subject to its operation." Although the author cites *Ex parte Garland*, he does not appear to me to deal directly with the question I have to deal with, which is, What is the nature of the right of the creditors against the assets specifically appropriated by the testator for the purpose of carrying on the trade? I am therefore really thrown back on the authority of Lord Justice Turner. If the right of the creditors is, as is stated by Lord Justice Turner, the right to put themselves, so to speak, in the place of a trustee, who is entitled to an indemnity; of course, if the trustee is not entitled, except on terms to make good a loss to the trust estate, the creditors cannot have a better right. They do get some additional benefit so as to avoid a supposed injustice; but the injustice to be avoided is the injustice of the *cestui que trust* walking off with the assets which have been earned by the use of the property of the creditor; but where the *cestui que trust* does not get that benefit, there is no injustice as between him and the creditors, and there is no reason for the court interfering at the instance of the creditors to give them a larger right than that they bargained for, namely, their personal right against the trustee. It appears to me, therefore, that if the trustee has no such right in such a case, they have none here.

The particular case before me is peculiar. It appears by the evidence, and it is the fact, that the executor carried on the Cambridge business in his own name, and not in the name of the infant, which was strictly in accordance with the terms of the will, for I do not suppose he could carry it on in any other way. By the will the testator allowed him to make use of one-eighth of the residue for the purpose of carrying on the business on behalf of the legatee, who was an infant of the name of Neill, during his minority; that Neill on his attaining twenty-one, was to be allowed to take the stock in trade, if he thought fit, not at its then value, but at its value at the testator's death, and all the rest fell into residue. But the executor and trustee did not follow the will, for, as I said before, he carried on business in his own name as executor, and used the assets then in the business. He did not do what the testator told him to do, namely, collect the book debts and throw them into general residue with the business, and then make use of one-eighth of the residue; he kept no separate banking account so as to shew the actual sums of money used in the business, but he carried on the business as it had been carried on before. Whether that makes any difference or not it is immaterial now to inquire, but that is what he actually did. He carried on the business, and in carrying it on he received £764. 16s. 1d. more profits than

he has accounted for, and this amount he owes the estate. Besides that he was carrying on the London business belonging to the estate. From that and other sources he has received £1668. 3s. 1d. more than he has accounted for; so that he is a very large defaulter. It is manifest that he could not take one penny out of this estate by way of indemnity until he made good his default.

Therefore unless the creditors can be in a position to shew—as to which there is no evidence before me—that there were profits from carrying on the business to an amount exceeding the deficit, so that something was gained by the use of these assets, it does not appear to me that they can be entitled to anything.

As the facts on this point do not appear I will give the creditors liberty to present a petition within a limited time, if they think they can support it, and I will not allow the assets to be distributed until they have had time to present their petition. I do not think it is a case to make the creditors pay costs.

The summonses are, therefore, dismissed without costs.⁵¹

In re GORTON.

DOWSE v. GORTON.

(Supreme Court of Judicature, Court of Appeals, 1889. *Law Reports* 40 Chancery Division, 536.)

This was an appeal from a decision of Sir H. F. Bristowe, Vice Chancellor of the County Palatine of Lancaster.

By an agreement dated the 25th of September, 1874, Luke Turner agreed with John Gorton and another person named Shemilt for the sale to them of his business of an elastic cord manufacturer, in Manchester, and his interest in the mill, machinery and plant, for £19,487., to be paid in instalments; and it was agreed that the purchasers and the survivor of them should carry on the business till all the instalments were paid. L. Turner died in 1874, and the plaintiffs were his executors. J. Gorton survived Shemilt and died in December, 1883. At that time £8,487. was due for principal and interest to the executors of Turner. J. Gorton left a will appointing his widow and J. W. Gorton his executors and trustees, and he declared that it should be lawful for his trustees, in case they should in their uncontrolled discretion think fit, to continue for such period as they might think fit any business in which he might be engaged at his death, and to engage and employ in any such business such part of his estate and effects as they should think desirable.

⁵¹ *Ex parte Edmonds*, 4 De G., F. & J. 488, 498 (1862); *In re Evans*, L. R. 34 Ch. Div. 597 (1887); *Mason v. Pomeroy*, 151 Mass. 164, 24 N. E. 202, 7 L. R. A. 771 (1890); *In re Blundell*, L. R. 40 Ch. Div. 370 (1888); *Cock v. Carson*, 45 Tex. 429 (1876).

The executors of Gorton carried on the business, using therein the assets of the testator. At the time of his death his assets were sufficient to discharge all his liabilities; but in carrying on the business his executors incurred trade debts to a considerable amount, including a debt for goods sold and delivered to Messrs. Riley & Sykes.

At the present time the assets of the testator in the hands of the executors were insufficient to pay the debt due under the agreement with Turner, and the liabilities incurred by the executors in the conduct of the business. Turner's executors accordingly brought an action for the administration of Gorton's estate, and also brought an originating motion asking that the following questions might be determined by the court:

1. Whether the executors of J. Gorton were entitled, as against the persons to whom he was indebted at the time of his death, to be indemnified out of his estate, or any part thereof, against debts and liabilities incurred by the executors in carrying on his business.

2. Whether all his book debts, stock, and the assets of the business carried on by the said J. Gorton at the time of his death, and now due and owing in respect of the said business, or belonging to the same, ought not to be applied in payment of the debts due by the said J. Gorton at the time of his death, in priority to any claim of his executors for indemnity, or to any claim of the persons with whom such executors dealt in carrying on the said business.

The motion also asked for administration of the estate in accordance with the opinion of the Court.

The Vice-Chancellor, on the 23d of November, 1887, made an order on the motion answering the second question in the affirmative, and giving no answer to the first question; and from this decision the business creditors of Gorton's executors appealed.

COTTON, L. J.⁵² This is an appeal against so much of the decision of the Vice-Chancellor as declared that "the book debts, stock, and other assets of the business carried on by John Gorton at the time of his death, and now due and owing in respect of the said businesses, or either of them, or belonging to the same, ought to be applied in payment of the debts due by the said John Gorton at the time of his death in priority to any claim of his executors or administrators, and then gave other consequential accounts."

What happened was this. At the time of the testator's death there were certain debts due and owing by him, but there are very few now remaining, the principal being a sum due in respect of the purchase-money payable by him to the executors of the vendor of the business which he carried on. By his will he empowered his executors to carry on his business, and they did carry it on; and, in carrying on that business, they became liable for certain sums for goods sold and delivered, and other matters. The trade creditors contend that they are not creditors of the testator, but creditors of his executors, and what

⁵² A part of the opinion of Lord Justice Lindley is omitted.

they say is, in my opinion, correct. They are not entitled to any lien at all against the assets of the testator—those which were his at the time of his death—and they have no claim against anything except in this way, that they have a claim against the executors personally, and, then, if those executors have any claim of indemnity against the estate, they are entitled to have that indemnity applied for their benefit—that is to say, they are to stand in the place of the executors in enforcing the indemnity. That, in my opinion is right. Where a business is carried on after the death of the testator, of course the persons who supply goods, are in no way creditors of the testator. They cannot make any claim against the executors as executors; but they can make a claim against the executors as the persons who dealt with them and on whose order they supplied the goods. Then if the executors are entitled to be indemnified they will stand in the place of the executors in enforcing that indemnity.

What is contended for on the other side is this: They say that the persons who dealt with the executors and supplied goods which came into the possession of the executors are not entitled to any indemnity till all the creditors of the testator are paid. It seems to me that that is not right. What the creditors of the testator seek to do is this: They seek to have the benefit of those services supplied by the trade creditors of the executors for the benefit of the estate without making any provision for them. But the creditors of the executors, who are not creditors of the testator, cannot make any claim to be paid anything out of what estate there may be in the hands of the executors if the executors themselves are indebted to the estate, so that they have got in their own pockets that out of which they ought to take their indemnity; and I think an account must be taken so as to ascertain what claims the executors have by way of indemnity against the estate. So far as concerns the original assets of the testator, they cannot, of course, claim as against the creditors of the testator. All they could claim would be an indemnity against their expenses in realizing the assets of the testator. That there is no doubt about. They will only be liable for the money they get properly from realizing those assets. Where there are liabilities undertaken under the direction of the testator's will they are entitled to an indemnity in respect of them out of the assets acquired by the executors after the testator's death. The creditors of the testator say, these are assets of our testator, and he could not by declaring a trust for you to perform, give you any right of indemnity against the property. That is not correct.

I think there must be a declaration that the executors of the testator are entitled, in priority to the persons to whom he was indebted at the time of his death, to be indemnified out of such part of the estate as has been acquired by the executors since his death against debts or liabilities incurred by the executors in carrying on this business for the full amount of such debts or liabilities; or, if the ex-

ecutors be in default to the testator's estate, then to the full amount of such debts or liabilities after deducting the amount in respect of which the executors are so in default. That is to say, you do not want a separate account of the carrying on of the business, but the executors must have their accounts taken; and if, in taking the accounts, it appears they are indebted to the estate, then they have got in their pocket the money out of which the indemnity to which they are entitled ought to be paid; but if they are not indebted to the estate then they have a right to be indemnified. Then the property which was the testator's at his death must go in favor of the creditors of the testator, and, consequently, the directions given which entitle the executors to an indemnity will be withdrawn from their claim in the administration of the estate. I think that will work it out.

Then this, which is merely of course, should be added, that the persons with whom the executors dealt in carrying on the business, and to whom they are now under any debts or liabilities in respect thereof, may be declared to be substituted for, or entitled to the right of, the executors with regard to the said indemnity as to such debts or liabilities. In my opinion that is a correct declaration, and the inquiries or accounts for carrying that into effect, if they are not already in the decree, must be added. That is the correct principle on which this case is to be decided. If the executors have dealt with the estate so as to make a large sum due from them they will not be entitled to any such indemnity, or rather they will be entitled to an indemnity, but, as I have already said, they have got the money in their purse to satisfy that.

LINDLEY, L. J. The question raised by this appeal can only be answered by considering, first of all, the rights of the creditors of the deceased, and, secondly, the rights of those who have become creditors of the executors since his death, and by adjusting those two rights where they appear to conflict.

Now what is the right of the creditor of the deceased? He is a creditor; he has no equitable rights as distinguished from legal rights against the assets of the deceased. His right is to sue the executor at law and get a judgment at law *de bonis testatoris*, and under that to seize under a *fi. fa.* the assets of the deceased in the hands of the executors at the time of his death. But he has nothing to do with future acquired property. That is his right at law. But then, if the executor has so dealt with the assets as to have increased them, the executor cannot put the accretion into his own pocket; neither can he hand it over to the legatees or next of kin so long as the debts of the testator are unpaid. Therefore I think it is plain that the creditors of the testator can get the subsequently acquired property, but not on the same footing that they could get the property of the testator which were assets of the testator at the time of his death. The creditor of the testator can only get the after acquired property on terms

which are just. He cannot take the property from the executors and make the executors pay for it out of their own pockets. He can only have the property subject to the right of the executors to indemnity, that is to say, he cannot throw the cost of getting the assets on the executors, and take the assets regardless of that cost. The right of the executors to be indemnified out of the subsequently acquired property lets in the rights of those to whom they are liable, that is to say, the creditors who have become such in the course of the executors trading or carrying on the business. Such are the rights of the creditors of the deceased.

Now, let us look at the rights of those who have dealt with the executors after his death. The right of those is to sue the executors. I believe there are some very exceptional cases in which subsequent creditors can get the assets, and I think there is authority for saying that funeral expenses can be got out of the assets; but with those exceptions the right of subsequent creditors is to sue the executors. They have nothing to do with the assets of the testator at all, and they can only get at them by the circuitous process of the executors being indemnified. Now, adjust those rights, and the thing is perfectly plain. Out of the assets of that part of the estate which existed at the death of the testator his creditors come first; the executor has no right of indemnity except as regards debts incurred by himself as executor. Those creditors have nothing to do with the will; as Mr. Buckley said, they have nothing to do with what the will says about carrying on the business or anything else. They ask for payment out of the assets of the testator and they get it. When you come to other assets, then, as I say, a distinction must be drawn; whereas they claim the assets of the testator free from all rights of the executors to be indemnified, they cannot claim the subsequently acquired assets except subject to the rights of the executors to indemnity. That is worked out by the variations in the order which Lord Justice Cotton has suggested, and which we propose to make. * * *

LOPES, L. J. I am of the same opinion.

CLACK v. HOLLAND.

(In Chancery, before Sir John Romilly, Master of the Rolls, 1854. 19 Beavan, 262.)

By a settlement made in 1806, certain real and personal estate was settled upon the Rev. Thomas Clack and Elizabeth Sadler, successively, for life, and afterwards for the benefit of the issue of the marriage.

In 1823, the trustees, under a power, converted the trust property into money and lent £1800, part of it, to Mr. Clack. By way of security a policy of assurance for £1200, effected on the life of Mr.

Clack in the names of Messrs. Aberdein, was assigned to them. Mr. Clack covenanted to keep up the policy, and, if he neglected to do so, the trustees were authorized to keep it up. Mrs. Clack died in 1845. Holland, one of the trustees, being at times unable after Mrs. Clack's death in 1845 to induce Mr. Clack to pay the premiums, with Mr. Clack's sanction, borrowed certain sums, from time to time, from Daniel Cullington, Samuel Riles, and Jane Eden, for that purpose, and they also paid some of the premiums and Holland gave Cullington and Riles a lien on the policy as security for the repayment.

Mr. Clack died in 1852, insolvent and without having repaid what he had borrowed from the trustees. Cullington gave notice to the office of his claim upon the policy, and the plaintiffs, the *cestuis que trust* of the settlement, also gave notice that they claimed it and filed their bill against the trustees of the settlement, Cullington, Riles and their father's representatives, to have the proceeds of the policy applied to pay the loan to Mr. Clack. The defendants, Holland, Cullington and Riles, insisted that they had a lien upon it, Holland for the premiums paid by him, and the other two for the sums advanced upon the security of the policy. Miss Eden disclaimed.

THE MASTER OF THE ROLLS.⁵³ * * * The next question to be considered is, what is the position of Richard Holland with reference to this policy. In the first place he was the assignee of the policy in trust to secure the repayment of the debt to the family. * * *

I find it was Thomas Clack's duty to pay the premiums, and that it was the duty of Richard Holland to compel him to pay them if he could. Down to 1845, no question arises, and the evidence satisfies me, that from that time down to September, 1852, when Thomas Clack died, Richard Holland had abundant means of paying the premiums on this policy. * * * Knowing that he ought to keep it up, the evidence shows me, that he did obtain funds which he ought to have applied for that purpose, and if he paid to Thomas Clack the money applicable to the payment of the premiums, he, by so doing, committed a breach of trust. * * * Assuming it to have been invalid, and that Richard Holland had not funds for the purpose, and could not get any from Thomas Clack, then it was his duty to have sued Thomas Clack on the deed for the amount necessary for keeping up the policy; and if the policies were liable to have been lost in the meantime, by a default in paying the premiums, I am of opinion, that if he, having no trust funds for that purpose, had applied his own money for keeping up the policy, he would then have had a lien on the policy, for the amount advanced by him for the purpose of keeping it on foot. * * *

The other question is with respect to the £51., the three sums paid for the premiums on the policy. I felt originally some difficulty on this point of the case. It appeared to me, in the first instance, that it was in the nature of salvage, and it was forcibly put by Mr.

⁵³ A part of the opinion is omitted.

Bird in the only way in which, if at all, it could be supported, as the case of the trustee saying, "I have behaved wrongly and have forfeited the money given to me for this purpose; will you advance the money and save the policy from being lost?" But, upon further consideration, I am of opinion that this is not the case. * * * In fact it amounts to this: A trustee has received money for the purpose of paying premiums on a policy which it is his duty so to apply; can he, by misapplying that money to his own use, and borrowing money for the purpose of keeping the policy on foot, give a valid security to the person who advances money for that purpose? It is obvious that if he can, he can gain an advantage by his own breach of trust; in my opinion it is invalid, and the same question as that in *Pinkett v. Wright* [2 Hare, 120, 127; 12 Cl. & Fin. 764]. There can be no question (as I have already stated), that if the trustee has no funds properly applicable to keeping up the policy, he may do, and in my opinion it is his duty to do what he can to protect the policy, and advance or obtain money for the purpose of paying the premium, and a lien on the policy will then be obtained, because the trustee has no money applicable for the purpose, and he does really what is the best for the cestui que trust in obtaining money for that purpose. Therefore the cestui que trust, having the benefit of that advance, cannot make the trustee pay personally that of which he has received the benefit. But if the cestui que trust supply funds, or if the trustee, by duly performing his trust ought to be in possession of funds applicable to that purpose, then he acquires no lien on the policy, and cannot confer one on another. * * *

The result of this case, in my opinion, is, that the plaintiffs are entitled to the produce of the policy, and I must make a declaration to that effect.⁵⁴

⁵⁴ *Muir v. City of Glasgow Bank*, 4 App. Cas. 337, 355, 360, 361, 362, 365, 368, 369, 370, 377, 388 (1879); *Todd v. Moorhouse*, L. R. 19 Eq. 69 (1874); *Campbell v. Gordon* (Ct. of Session) 2 Dunlop, 639 (1840); *Johnson v. Le-man*, 131 Ill. 609, 23 N. E. 435, 7 L. R. A. 656, 19 Am. St. Rep. 63 (1890); *Glenn v. Allison*, 58 Md. 527 (1882); *Noyes v. Blakeman*, 6 N. Y. 567 (1852); *New v. Nicoll*, 73 N. Y. 127, 29 Am. Rep. 111 (1878); *Perry v. Board of Mis-sions*, 102 N. Y. 99, 6 N. E. 116 (1886); *Van Slyke v. Bush*, 123 N. Y. 47, 25 N. E. 196 (1890); *Stanton v. King*, 8 Hun (N. Y.) 4 (1876), affirmed 69 N. Y. 609 (1877); *Fowler v. Mutual Ins. Co.*, 28 Hun (N. Y.) 195 (1882); *Randall v. Dusenbury*, 39 N. Y. Super. Ct. 174 (1875), affirmed 63 N. Y. 645 (1875).

The foregoing cases recognize the right of a trustee under certain circumstances to stipulate that not he personally, but the trust estate only, shall be liable. But according to the principal case he cannot thus bind the trust estate so long as he is in default to the trust.

II. CREDITORS OF THE CESTUI QUE TRUST.

BENNET and Another v. BOX and Others.

(In Chancery, before Lord Chancellor Clarendon, 1662. 1 Chancery Cases, 12.)

Anno 15 Jac.—Ralph Allen purchaseth lands in his own name, and in the name of Edward Hammond, in trust for Ralph Allen and his heirs, and Hammond to take nothing thereby; but the trust is not expressed in the conveyance. William Allen, senior, did borrow £600. of John Bennet, and the said William Allen, Ralph Allen, and William Allen, Jr., son and heir of the said Ralph Allen (William Allen, Sr., being first bound in the bond), 1630, did become bound unto the said John Bennet, since deceased, for the payment of the said £600., by bond of £1,000., wherein they bound themselves and their heirs, under whom the plaintiffs are well entitled to the debt in question. And one witness deposes, that Ralph Allen was a good husband, not one that contracted any debts of his own, and believes he and William Allen, Jr., were only sureties for William Allen, senior. Ralph Allen dies, and Hammond survives, and after dies; then William Allen, son and heir of Ralph Allen, dieth without issue, and the now defendants, as heirs at law, bring their bill against the heirs of Hammond, who had the estate in law, to have the lands conveyed in performance of the trust; which is decreed to them accordingly, and the lands conveyed unto them as heirs at law of Ralph Allen.

The now plaintiffs bring their action of debt at law against Henry Box, since deceased, and the now defendants, as heirs of Ralph Allen. The defendants thereunto pleaded *riens per discent praeter a third part of a messuage worth £6. 13s. 4d. per annum.*

January, 1662. The now plaintiffs bring their bill in this court against the defendants, and Henry Box, the defendant's late husband, who had the lands decreed and conveyed unto them as heirs of Ralph Allen, to have them decreed as heirs, to pay the just debts of Allen, or to have the said lands made liable to pay the said debts as assets in equity.

The defendants, Box and Stonehouse, pleaded, that the said action still depended, which is a double vexation; and demur, and demand judgment, whether they, as heirs, shall be charged in equity, without any trust or agreement further than the law chargeth them.

On hearing thereof, a case was stated on the bill, plea and demurrer; and afterwards Henry Box died. And before any bill of revivor against the defendants, it was ordered May 12, 1653, that the defendants do answer the plaintiff's bill; but the benefit of the plea to be considered at the hearing.

The defendants deny that they have entered into, or received any of the profits of the said lands, the same being ever since 7 Car. extended for the debts of Ralph Allen, and ever since held by Sir John

Banks and his executors, and formerly before the extents were let at £500. per annum, and after at £300. per annum, and now but at £400. per annum, and whereout above £60. is deducted for the charges of the Sea-Banks, and the rest will not pay the interest of the principal debt, as the extendors allege.

An original was filed by the plaintiffs against Henry Box and the other defendants, on the bond in question in the Common Pleas, bearing teste 16 Feb. 1659.

The defendant, Walter Stonehouse, did for £400. bargain and sell his third part of the reversion in fee of the lands in question to Henry Box, deceased, by deed bearing date 3d Oct. 1660; and the said Henry paid then to the said Walter the £400. purchase money for the same, and the defendants, as they swear by their answer, had not then, or in some months after, any notice of the said original, and no notice proved; and one witness deposeth, he believeth there was no notice; for he being conversant in all Mr. Box's affairs, if there had been any notice, he should have heard of it, as he verily believes.

The defendant George Burdet, after the other defendants were ordered to answer, put in his answer, and thereby insisted on the same matter the other defendants did by their plea and demurrer, and was on June the 9th last past, served with process ad audiendum judicium upon 21st June following, but appeared not at the hearing, or any for him.

1. Question. Whether the said lands, as this case is, shall or ought to be decreed as assets in equity?

2dly. Or whether the plaintiffs ought to have any decree in this case against the defendants?

Chief Justice HYDE, Chief Baron HALES, and Justice WINDHAM, were of opinion, on hearing counsel on both sides, that the lands in the said case and bill mentioned, (as the case is stated) are not, nor ought to be decreed as assets in equity, and that the plaintiffs ought not to have any decree against the defendants.

Afterwards in Hillary Vacation, 1664, the bill was dismissed upon the judge's certificate, 14th Nov. 1664, or 1661, in a case wherein Clark was plaintiff against Sir Thomas Fanshaw.

PRAT v. COLT.

(In Chancery, before Lord Keeper Bridgman, 1669. 1 Cases in Chancery, 128.)

The plaintiff had a judgment against George Holt, and brought his bill against his heir, to subject certain lands which he had a decree of this court for, upon a trust for his father and his heirs to satisfy his debts; and the defendant demurred, and this demurrer allowed: and the Lord Keeper conceived it all one with Bennet and Box's Case. But quære, since the statutes of Frauds and Perjuries.

LORD GREY and Others v. COLVILE and Others.

(In Chancery, before Lord Finch, Chancellor, 1678. 2 Reports in Chancery, 143.)

The plaintiff the Lady Grey's bill is to be relieved for a debt of £1500., and interest on bond, wherein John Colvile did bind himself and his heirs, to repay the same unto the plaintiff her executors and assigns, that the same might be paid out of the lands which were purchased by the said John Colvile, with his own proper money, in the names of himself and the defendant's wife, to hold to them two for their lives, and then to the heirs of Colvile, and the rest were purchased in the names of the said defendants Morris and Saunders, in trust for the said John Colvile and his heirs; that soon after, and before the £1500. was paid, the said John Colvile died, and the right and equity of the premises, during the life of the said defendant's wife, is in Josia Colvile, and the reversion in fee, after the death of the said wife, will descend to the said defendant Josia Colvile, as son and heir of the said John Colvile, and the profits are received by him or for his use; that the said John Colvile dying intestate, administration is granted to Dorothy his relict, who pleads she hath no personal estate, whereupon the Lady Grey commenced a suit at law, by filing an original for her said debt against the defendant Josia, as son and heir of the said John Colvile and hath got judgment thereon to have satisfaction for the said debt, out of the reversion of the lands of John, which descended in fee to the said defendant Josia Colvile, and ought to have satisfaction accordingly; but the said defendant Josia pretendeth he hath nothing by descent in present, but the reversion of the lands purchased in the names of John Colvile and his wife, after the death of his wife; whereas he and the other two defendants were only trustees for John Colvile and his heirs; and their trust being now come to the defendant Josia, they are liable as assets, in equity, for satisfaction of the plaintiff's debts, and the plaintiff ought to be let into the immediate possession, and the said Josia also insists, that the premises are incumbered by a former judgment of one lease for £800., and the plaintiff's creditors, and others the creditors in their suit, seeking relief against the same defendants, upon the same trust and equity, and to have their debts paid out of the said lands, they insisting they are creditors by judgment, grounded on original of the same day and date with the said Lady Grey, and ought to be satisfied, in equal degree and time.

The plaintiff Creed and the other creditors, insist, that they for so much as the estate in law of Wise is in the heir, that their judgments ought to attach the lands according to priority of originals, and though the said Leke hath obtained a decree, prior to the creditors in these suits, yet the same is to be subject to the direction of this court, and ought not to take place, but according to the date of their originals.

This court (it being admitted by all, that the original on which the said Leke's judgment is grounded, is prior to all the other creditors' originals, and that the plaintiff the Lady Grey's and Creed's originals are next in priority, and bear the same date one with another, and ought next to be satisfied with other judgments, who originally bear the same date) declared, that the estate purchased in the names of the defendant's wife as aforesaid, was a trust for life, attending the reversion, and so liable to make the several plaintiffs satisfaction for their debts, and should be enjoyed by the plaintiffs, against the said Wise and Josia Colville the heir; and the court decreed that if the estate of Wise, as aforesaid, was not sufficient, then the said reversionary lands, purchased in the names of the said Morris and Saunders, after the death of Sir John Tufton, who hath an estate for life in the said lands, should go towards satisfaction of the said debts.

CREED v. COLVILLE.

(In Chancery, before Lord Keeper North, 1683. 1 Vernon, 172.)

The single point of this case was, whether the trust of an estate in fee descended upon the heir is liable in equity to the satisfaction of a debt by bond, wherein the heir is expressly bound?

The late Lord Chancellor had decreed it assets; but upon a rehearing before the Lord Keeper, he seemed doubtful.

For the heir against the decree it was said, that this point had formerly been settled upon great advice in the case of *Box v. Bennett*, which was heard by the Lord Chancellor, with the assistance of the Lord Chief Justice Hales, and Mr. Justice Wadham Windham. And that this decree was unreasonable, in that an account of the profits was decreed during the infancy; whereas, at law, if the heir is bound in the bond of the ancestor, and after the death of his ancestor is sued during his infancy, the parol must demur, and the plaintiff cannot have judgment against the infant, neither are the profits liable during his minority.

But for the decree it was argued, that the precedent of *Box and Bennett* was looked upon as a hard case, and had never carried any great authority with it; it being a precedent of the judges' making, who look upon the Court of Chancery as precarious in its jurisdiction, and therefore, as much as may be, are for restraining it to the rules of law; but a trust, being a creature of this court, ought to be governed solely by the rules of equity, and equity ought to be conformable throughout; and therefore why should not the trust of an inheritance be assets, as well as the trust of a term? an equity of redemption is every day made assets in equity; and what reason can be given, why in equity a trust of an inheritance should not be assets, where the inheritance itself, had it not been in trust, would have been assets at law?

As to the profits during minority, they said, that was not insisted on by them, though they had no precedent in equity, that the parol should demur; but infants were there suable.

LORD KEEPER. I know the case of Box and Bennett has had hard words given it, and been much railed at; but the decree in that cause was made upon great advice, and he did not know, how he could be better advised now; and said, there was a difference between the case of an heir, and the case of an executor; and therefore the trust of a term and the trust of an inheritance are not the same thing, as to this point; for whatever money comes to the hands of the executor, either by sale of the term, or if money be decreed to him, in this court, will be assets; but if an heir, before an action brought, sells and aliens the assets, the money is not at law liable in his hands; unless the sale were with fraud or collusion; as if an heir sell and buy again, there the new purchased lands will be assets. And as to an equity of redemption, he said, that if a man had a mortgage and a bond; before the mortgage should be redeemed by the heir the bond ought to be satisfied; but he did not know that an equity of redemption should be assets in equity to all creditors: and mentioned Mr. Baron Weston's case against Mrs. Danby which was thus:

Baron Weston had a debt due to him by bond, wherein the heir was bound, but it happened that for three descents the heir was still an infant, so the parol demurred at law, till the interest much exceeded the penalty of the bond; and Mrs. Danby having been all along guardian to these infants, and received the profits of the estate without paying any debts, and converted them to her own use, the Baron therefore brought an action against her, and called her administrator to these children; but the Baron's policy did not prevail.

As to the case in question, his Lordship said, he would not throw such a cause out of court without good consideration first had, and that he should be much governed by the precedent of Box and Bennett, unless they could shew that the latter precedents had been otherwise; and directed them to attend him with precedents towards the latter end of the term.

FREEDMAN'S SAVINGS & TRUST CO. v. EARLE.

(Supreme Court of the United States, 1884. 110 U. S. 710, 4 Sup. Ct. 226, 28 L. Ed. 301.)

Appeal from the Supreme Court of the District of Columbia.

The appellee recovered a judgment against Robert P. Dodge in the supreme court of the District of Columbia on January 4, 1878, for \$7,700, with interest and costs, which was revived April 2, 1879, and on which a *fi. fa.* was issued April 9, 1879, and returned *nulla bona*.

On June 1, 1877, Dodge, the judgment debtor, being then seized in fee-simple of certain real estate in the city of Georgetown, in this

district, conveyed the same by deed duly recorded to Charles H. Cragin, Jr., in trust, to secure to Nannie B. Blackford payment of the sum of \$2,000, with interest, according to certain promissory notes given therefor, and which were indorsed to Charles H. Cragin.

On April 10, 1879, the appellee filed his bill in equity, to which Dodge, Charles H. Cragin, Jr., Charles H. Cragin, and Nannie B. Blackford were made defendants, the object and prayer of which were to take an account of the debt secured by the trust deed, and, subject thereto, to have the premises sold and the proceeds of the sale applied to the satisfaction of the appellee's judgment.

The defendants having appeared and answered, a decree according to the prayer of the bill was rendered June 11, 1879.

On December 27, 1879, leave therefor having been obtained, the appellants filed a petition in the cause, setting forth the recovery of a judgment in their favor against the defendant Dodge, in the sum of \$7,386.47, with interest and costs, on February 11, 1879, in the supreme court of the District of Columbia, and that on December 2d a fi. fa. had been issued thereon, and returned nulla bona December 19, 1879; and praying that they may be made parties complainant in the cause; that the equitable interest of Dodge in the real estate described be subjected to the satisfaction of their judgment; that the same be sold, and the proceeds of sale be brought into court and distributed according to law. To this petition Dodge answered, admitting the recovery of the judgment as alleged.

On May 25, 1880, the trustee appointed for that purpose under the decree of June 11, 1879, reported a sale of the premises for \$5,525, and the same, on June 25, 1880, was confirmed. The cause was then referred to an auditor to state the account of the trustee to sell, whose report showed an appropriation of the proceeds of the sale, after payment of costs, in payment to that extent of the appellee's judgment. On exceptions to this report, a final decree confirming the same was made September 14, 1880, which decree, on appeal to the general term, was affirmed December 10, 1880. From that decree this appeal is prosecuted.

Mr. Justice MATTHEWS delivered the opinion of the Court. After reciting the facts in the foregoing language he continued:

As ground of reversal, it is assigned by the appellant that the proceeds of the sale of the equitable interest of Dodge, the judgment debtor, should have been distributed pro rata between the appellees and the appellants, instead of having been awarded exclusively to the appellee. It is contended on behalf of the appellants that the interest of the judgment debtor in the land being an equity merely, is not subject to execution at law; and as it can be reached by judgment creditors only through the intervention and by the aid of a court of equity, it becomes of the nature of equitable assets, and when sold the proceeds will be applied, according to the maxim that equality is equity, ratably among the creditors.

In the case of *Morsell v. First Nat. Bank*, 91 U. S. 357, 23 L. Ed. 436, it was decided that under the laws of Maryland in force in this district, judgments at law were not liens upon the interest of judgment debtors who had previously conveyed lands to a trustee in trust for the payment of a debt secured thereby. Mr. Justice Swayne said, (page 361:) "The judgments in nowise affected the trust premises until the bill was filed. That created a lien in favor of the judgment creditors. There was none before." And it was accordingly held that in the distribution of the proceeds of sale the judgments must be postponed to debts secured by other deeds of trust made before the filing of the bill, but subsequent to the rendition of the judgments. But that decision leaves open the question arising here between judgment creditors seeking satisfaction in equity out of the debtor's equitable estate. It becomes necessary, therefore, to determine the nature of the right and the principle of distribution which arises from it.

At common law executions upon judgments could not be levied upon estates merely equitable, because courts of law did not recognize any such titles and could not deal with them. They could not be levied upon the estate of the trustee when the judgment was against the cestui que trust for the same reason; and when the judgment was against the trustee, if his legal estate should be levied on, the execution creditor could acquire no beneficial interest, and if the levy tended injuriously to affect the interest of the cestui que trust, the latter would be entitled to relief, by injunction or otherwise, in equity. *Lewin, Trusts*, 171, 186; 2 *Spence, Eq. Jur.* 39.

But as courts of equity regarded the cestui que trust as the true and beneficial owner of the estate, to whose uses, according to the terms of the trust, the legal title was made subservient, so in its eyes the estate of the cestui que trust came to be invested with the same incidents and qualities which in a court of law belonged to a legal estate, so far as consistent with the preservation and administration of the trust. This was by virtue of a principle of analogy, adopted because courts of equity were unwilling to interfere with the strict course of the law, except so far as was necessary to execute the just intentions of parties, and to prevent the forms of the law from being made the means and instruments of wrong, injustice, and oppression.

Thus equitable estates were held to be assignable and could be conveyed or devised; were subject to the rules of descent applicable to legal estates; to the tenancy by curtesy, though not to dower, by an anomalous exception afterwards corrected by statute 3 & 4 Wm. IV, c. 105; and were ordinarily governed by the rules of law which measure the duration of the enjoyment or regulate the devolution or transmission of estates; so that, in general, whatever would be the rule of law, if it were a legal estate, was applied by the court of chancery by analogy to a trust estate. 1 *Spence, Eq. Jur.* 502.

As judgment creditors, after the statute of Westminster, 13 Edw., c. 18, were entitled, by the writ of *elegit*, to be put in possession of a moiety of the lands of the debtor, until satisfaction of the judgment; and as it would be contrary to equity to permit a debtor to withdraw his lands from liability to his judgment creditors, this analogy was at an early date extended, so as to give to judgment creditors similar benefits in respect to the equitable estate of their debtors; and as the remedies in favor of judgment creditors by way of execution upon the legal estate of their debtors have been enlarged, they have been imitated by a corresponding analogy as to equitable estates by courts of equity. This is in pursuance of the principle stated in a pregnant sentence by Lord Northington, in *Burgess v. Wheate*, 1 Eden, 177-261, where he said: "For my own part, I know no instance where this court ever permitted the creation of a trust to affect the right of a third party." *Id.* 151. It is embodied in the maxim, *æquitas sequitur legem*.

It was accordingly held by Lord Nottingham, in the anonymous case cited in *Balch v. Wastall*, 1 P. Wm. 445, "that one who had a judgment, and had lodged a *fiery facias* in the sheriff's hands, to which *nulla bona* was returned, might afterwards bring a bill against the defendant, or any other, to discover any of the goods or personal estate of the defendant, and by that means to effect the same;" and although Lord Keeper Bridgman, in *Pratt v. Colt*, *Freem. Cas. Ch.*, by Hovenden, 139, refused to permit a trust estate, which had descended to the heir, to be extended upon an *elegit* on a judgment against his ancestor, the reporter adds: "But note that this hath not been taken to be a good demurrer by the old and best practicers, as little according with good reason, for the heir at law is as much chargeable with the ancestor's judgment as the executor with the testator's debts, and so equity ought to follow the law." Three years subsequently to this decision the statute of frauds, 29 Car. II, c. 3, was enacted, the 10th section of which made trust estates in fee-simple assets for the payment of debts, and subject to an *elegit* upon judgment against the *cestui que trust*. But this statute did not extend to chattels real, to trusts under which the debtor had not the whole interest, to equities of redemption, or to any equitable interest which had been parted with before execution sued out. *Forth v. Duke of Norfolk*, 4 Madd. 503. The statute of 5 Geo. II, c. 7, which made lands within the English colonies chargeable with debts, and subject to the like process of execution as personal estate, was in force in Maryland; but as it did not interfere with the established distinction between law and equity, it did not permit an equitable interest to be seized under a *fiery facias*. *Lessee of Smith v. McCann*, 24 How. 398, 16 L. Ed. 714. But as the effect of these statutes was to enlarge the operation of executions upon legal estates, so the corresponding equitable remedy as to equitable estates was also enlarged, and as to them equitable executions were enforced to the same extent

to which executions at law were enforceable upon estates subject to seizure under them.

This mere equity, consisting in the right to obtain the aid of the court in subjecting the equitable interest of the debtor, not being a lien at law or a specific charge in equity, nevertheless constitutes such an interest, and creates such a privity, as entitles the judgment creditors to redeem a prior mortgage, and succeeding thus to the rights of the mortgagee in England, where the doctrine of tacking prevailed, he was permitted to hold the whole estate as security for his judgment also, even when by virtue of an *elegit* at law, he would be entitled only to a moiety of the debtor's land. And he could file his bill to redeem without previously issuing an execution. *Neate v. Duke of Marlborough*, 3 Mylne & C. 407. The reason for this, assigned by Lord Cottenham in the case just cited, is that, inasmuch as the court finds the creditor in a condition to acquire a power over the estate by suing out the writ, it does what it does in all similar cases—it gives to the party the right to come in and redeem other incumbrances upon the property.

But in other cases, when the object of the bill is to obtain satisfaction of the judgment, by a sale of the equitable estate, it must be alleged that execution has been issued. This is not supposed to be necessary wholly on the ground of showing that the judgment creditor has exhausted his remedy at law; for, if so, it would be necessary to show a return of the execution unsatisfied, which, however, is not essential. *Lewin on Trusts*, 513. But the execution must be sued out; for, if the estate sought to be subjected is a legal estate, and subject to be taken in execution, the ground of the jurisdiction in equity is merely to aid the legal right by removing obstacles in the way of its enforcement at law. *Jones v. Green*, 1 Wall. 330, 17 L. Ed. 553. And if the estate is equitable merely, and therefore not subject to be levied on by an execution at law, the judgment creditor is bound, nevertheless, to put himself in the same position as if the estate were legal, because the action of the court converts the estate, so as to make it subject to an execution, as if it were legal. The ground of the jurisdiction, therefore, is not that of a lien or charge arising by virtue of the judgment itself, but of an equity to enforce satisfaction of the judgment by means of an equitable execution. And this it effects by a sale of the debtor's interest subject to prior incumbrances, or according to circumstances, of the whole estate, for distribution of the proceeds of sale among all the incumbrancers, according to the order in which they may be entitled to participate. *Sharpe v. Earl of Scarborough*, 4 Ves. 538.

It is to be noted, therefore, that the proceeding is one instituted by the judgment creditor for his own interest alone, unless he elects to file the bill also for others in a like situation, with whom he chooses to make common cause; and as no specific lien arises by virtue of the judgment and execution alone, the right to obtain satisfaction out

of the specific property sought to be subjected to sale for that purpose dates from the filing of the bill. "The creditor," says Chancellor Walworth, in *Edmeston v. Lyde*, 1 Paige (N. Y.) 637-640, 19 Am. Dec. 454, "whose legal diligence has pursued the property into this court, is entitled to a preference as the reward of his vigilance;" and it would "seem unjust that the creditor who has sustained all the risk and expense of bringing his suit to a successful termination should in the end be obliged to divide the avails thereof with those who have slept upon their rights, or who have intentionally kept back that they might profit by his exertions when there could no longer be any risk in becoming parties to the suit." As his lien begins with the filing of the bill, it is subject to all existing incumbrances, but is superior to all of subsequent date. As was said by this court in *Day v. Washburn*, 24 How. 352, 16 L. Ed. 712: "It is only when he has obtained a judgment and execution in seeking to subject the property of his debtor in the hands of third persons, or to reach property not accessible to an execution, that a legal preference is acquired which a court of chancery will enforce." This is in strict accordance with the analogy of the law, as it was recognized that the judgment creditor who first extends the land by elegit is thereby entitled to be first satisfied out of it. It is the execution first begun to be executed, unless otherwise regulated by statute, which is entitled to priority. *Rockhill v. Hanna*, 15 How. 189, 195, 14 L. Ed. 656; *Payne v. Drewe*, 4 East, 523. The filing of the bill, in cases of equitable execution, is the beginning of executing it.

The passage cited from the opinion in *Day v. Washburn*, *supra*, speaks of the preference thus acquired by the execution creditor as a legal preference. It was distinctly held so to be by Chancellor Kent in *McDermutt v. Strong*, 4 Johns. Ch. (N. Y.) 687. He there said: "But this case stands on stronger ground than if it rested merely on the general jurisdiction of this court, upon residuary trust interests in chattels, for the plaintiffs come in the character of execution creditors, and have thereby acquired, by means of their executions at law, what this court regards as a legal preference, or lien on the property so placed in trust;" and "admitting that the plaintiffs had acquired, by their executions at law, a legal preference to the assistance of this court, (and none but execution creditors at law are entitled to that assistance,) that preference ought not, in justice, to be taken away. Though it be the favorite policy of this court to distribute assets equally among creditors, *pari passu*, yet, whenever a judicial preference has been established by the superior legal diligence of any creditor, that preference is always preserved in the distribution of assets by this court." The decision in that case was made, giving the priority to the execution creditors who filed the bill, when, otherwise, by virtue of an assignment by the debtor who was insolvent, the proceeds of the equitable interest sought to be subjected would have been distributed ratably among all creditors.

This case, often cited and never questioned, shows that the doctrine of equitable assets, to which we are referred by the appellant as the ground of his claim, has no application to the case. Ordinarily and strictly, the term "equitable assets" applies only to property and funds belonging to the estate of a decedent, which by law are not subject to the payment of debts, in the course of administration by the personal representatives, but which the testator has voluntarily charged with the payment of debts generally, or which, being non-existent at law, have been created in equity, under circumstances which fasten upon them such a trust. *Adams on Equity*, 254. But, as was said by Chancellor Kent in *Williams v. Brown*, 4 Johns. Ch. (N. Y.) 682, the doctrine "does not apply to the case of a debtor in full life, for there is no equitable trust created and attached to the distribution of the effects in the latter case." Property held by a trustee for the testator is legal assets, for, although the benefit of the trust, if resisted, cannot be enforced without equitable aid, yet the analogy of the law will regulate the application of the fund. To constitute equitable assets, the trust imposed by the party, or by the court, must be for the benefit of creditors generally.

It is true that in *Moses v. Murgatroyd*, 1 Johns. Ch. (N. Y.) 119, 7 Am. Dec. 478, Chancellor Kent held surplus money arising from the sale of mortgaged premises to be equitable assets, but that was in a case where the mortgagor was deceased and the fund was in a court of equity for distribution, and when the judgment to which priority was refused was confessed by the administrator.

In *Purdy v. Doyle*, 1 Paige (N. Y.) 558, the rule was stated by Chancellor Walworth, in these words: "If it is such property as the judgment creditors could obtain a specific or general lien on at law, they are entitled to the fruits of their superior vigilance, so far as they have succeeded in getting such lien. But if the property was in such a situation that it could not be reached by a judgment at law, and the fund is raised by a decree of this court, and the creditors are obliged to come here to avail themselves of it, they will be paid on the footing of equity only."

But a specific lien, whether legal or equitable, on property liable as equitable assets, was always respected by courts of equity. *Free-moult v. Dedire*, 1 P. Wms. 429; *Finch v. Earl of Winchelsea*, Id. 277; *Ram on Assets*, 318. And Lord Chancellor Parker, in *Wilson v. Fielding*, 2 Vern. 763, 10 Mod. 426, drew the distinction between property which is assets in a court of equity only and certain property which a creditor cannot come at without the aid of a court of equity. In that case the mortgage debt had been paid out of the personal estate by the executor, thus exonerating the mortgaged premises which had descended to the heir. The unsatisfied creditors filed a bill to require the heir at law to refund, which was "a matter purely in equity and a raising of assets where there were none at law."

And see *Atlas Bank v. Nahant Bank*, 3 Metc. (Mass.) 581; *Cod-*

wise v. Gelston, 10 Johns. (N. Y.) 507, 522; Tennant v. Stoney, 1 Rich. Eq. 222, 44 Am. Dec. 213; 1 Story, Eq. Jur. § 553; 2 White & T. Lead. Cas. Eq. pt. 1, p. 390.

We have already seen that the filing of a bill by an execution creditor to subject the equity of the debtor in his life-time, created a lien and gave him a legal preference. And in the English chancery, although equities of redemption after the death of the mortgagor are classed as equitable assets, the rule of distribution, *pari passu*, is modified in its application to them in respect to judgment creditors by permitting them to retain their priority over other claims, because, if such priority were not allowed, the judgment creditor might acquire it by redeeming the mortgage. Adams, Eq. 256. Legal assets, according to the definition of Mr. Justice Story, (Eq. Jur. § 551,) "are such as come into the hands and power of an executor or administrator, or such as he is intrusted with by law *virtute officii* to dispose of in the course of his administration. In other words, whatever an executor or administrator takes *qua* executor or administrator, or in respect to his office, is to be considered legal assets." And this is the modern doctrine in England. In *Lovegrove v. Cooper*, 2 Smale & G. 271, it was held, for that reason, that the proceeds of real estate directed to be sold for the payment of debts, and paid by the purchaser into court, were legal and not equitable assets.

It follows from this, that in this country generally, where the real estate of a decedent is chargeable with the payment of debts, and, in case of a deficiency of personal property for that purpose, may be subjected to sale and distribution as assets by the personal representative in the ordinary course of administration, the distinction between legal and equitable assets has ceased to be important. In every such case the equity of redemption could only be applied after sale by the executor or administrator in the ordinary course of administration, subject to whatever liens may have been imposed upon it in the life-time of the mortgagor, and among them, as we have seen, is that of an execution creditor who has filed his bill to subject it to the payment of his judgment. So, in other cases where the rule of equality in distribution, as to equitable assets, applies, as in cases of assignments by the debtor himself for the payment of debts generally, and in cases of bankruptcy and insolvency, except as otherwise expressly provided by statute, the estate passes, subject to existing liens, including that of an execution creditor who had previously filed a bill to subject the equitable interest of the debtor, and his priority is respected and preserved. The lien is given by the court in the exercise of its jurisdiction to entertain the bill and to grant the relief prayed for; and to distribute the proceeds of the sale for the benefit of others, equally with the execution creditor first filing the bill, would be to contradict the very principle of the jurisdiction itself, and defeat the very remedy it promised; for the fruits of litigation, according to the rule of equality, would have to be divided, not only with

other judgment and execution creditors, but, as well; with all creditors, whether their claims had been reduced to judgment or not.

For these reasons the decree appealed from is affirmed.⁵⁵

STATUTE 29 CAR. II (1676) c. 3, § 10.

Sec. 10. And be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June it shall and may be lawful for every sheriff or other officer to whom any writ or precept is or shall be directed, at the suit of any person or persons, of, for and upon any judgment, statute or recognizance hereafter to be made or had, to do, make and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents and hereditaments, as any other person or persons be in any manner or wise seized or possessed, or hereafter shall be seized or possessed, in trust for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the said party against whom execution hereafter shall be so sued, had been seized of such lands, tenements, rectories, tithes, rents or other hereditaments of such estate as they be seized of in trust for him at the time of the said execution sued; (2) which lands, tenements, rectories, tithes, rents and other hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed freed and discharged from all incumbrances of such person or persons as shall be so seized or possessed in trust for the person against whom such execution shall be sued; (3) and if any cestui que trust hereafter shall die, leaving a trust in fee simple to descend to his heir, there and in every such case such trust shall be deemed and taken, and is hereby declared to be, assets by descent, and the heir shall be liable to and chargeable with the obligation of his ancestors for and by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession in like manner as the trust descended; any law, custom, or usage to the contrary in any wise notwithstanding.

LEDBETTER v. ANDERSON and Others.

(Supreme Court of North Carolina, 1868. 62 N. C. 323.)

Bill filed to Fall Term, 1862, of the Court of Equity for Rutherford, and at Fall Term, 1866, set for hearing upon the pleadings and proofs, and transmitted to this court.

The complainant alleged that he had purchased at execution sale

⁵⁵ See *Newell v. Morgan*, 2 Harr. (Del.) 225 (1837).

the interest of the defendant Anderson in a certain tract of land, had received a sheriff's deed therefor; that Anderson's interest by virtue of a bond for title from the defendant Frazer; that had offered to pay Frazer the balance due to him upon such bond and now brings the same into court for the same purpose; that Frazer and Anderson had conspired to defraud him, etc.

The prayer was that Frazer be compelled to take the money to make a title, or that the land be sold for the plaintiff's indemnity, for other relief.

The answers admitted that Anderson's title was under a bond from Frazer, and that a large portion of the purchase money was still due. After other statements which are immaterial here, they denied the charge of conspiracy, and submitted to the court whether the plaintiff disclosed any equity.

READE, J. From the bill, as well as from the answers, it appears that the defendant Anderson had only a bond for title to the land levied upon by the sheriff under whose sale the plaintiff purchased, and that Anderson had paid only a part of the purchase money.

It is well settled that a purchaser of land holding only a bond for title, without having paid the whole of the purchase money, has no such interest in the land as is subject to execution. The plaintiff therefore obtained no title by his purchase.

The case is not altered by his offering to pay the balance due, or by his bringing the money into Court. Having acquired no interest in the land, his offering to pay for it is no more than if he were to offer a certain price for any other tract of land and then file a bill to obtain a title.

The bill must be dismissed, with costs.⁵⁶

PER CURIAM. Decree accordingly.

⁵⁶ Section 10 of the statute of frauds applies only where the cestui que trust, the judgment debtor, has the entire equitable interest. *Forth v. Ives*, 4 Mad. 503 (1820); *Doe v. Greenhill*, 4 B. & Al. 684 (1818); *Harris v. Booker*, 4 Bing. 96 (1827); *Pettit v. Johnson*, 15 Ark. 55 (1846); *Pope v. Boyd*, 22 Ark. 535, 538, 539 (1861); *Pitts v. McWhorter*, 3 Gr. 46 Am. Dec. 405 (1847); *Akin v. Freeman*, 49 Ga. 51, 65, 66 (1873); *Boggs v. Perry*, 17 Johns. (N. Y.) 351, 8 Am. Dec. 411 (1819); *Id.* 1 Johns. Ch. (N. Y.) 52 (1814); *Jackson v. Bateman*, 2 Wend. (N. Y.) 570, 573 (1829); *Lynch v. Utica Ins. Co.*, 18 Wend. (N. Y.) 236 (1837); *Ontario Bank v. Root*, 3 P. (N. Y.) 478 (1832); *Kellogg v. Wood*, 4 Paige (N. Y.) 578, 619 (1834); *Baker v. Power*, 10 Paige (N. Y.) 562 (1844); *Brown v. Graves*, 11 N. C. 1826; *Mordecai v. Parker*, 14 N. C. 425 (1832); *Battle v. Petway*, 27 N. C. 576, 44 Am. Dec. 59 (1845); *Thompson v. Ford*, 29 N. C. 418 (1847); *Tall Reed*, 72 N. C. 336 (1875); *White v. Kavanagh*, 8 Rich. Law (S. C.) 1855; *Bristow v. McCall*, 16 S. C. 545 (1881); *Smitheal v. Gray*, 1 Hum. (Tenn.) 491, 34 Am. Dec. 664 (1840); *Coutts v. Walker*, 2 Leigh (Va.) 1830.

"Three years subsequently to this decision [*Prat v. Colt*, *Freeman's* in Ch. 139], the Statute of Frauds, 29 Charles II, c. 3, was enacted, the section of which made trust estates in fee simple assets for the payment of debts, and subject to an elegit upon judgment against the cestui que trust. But this statute did not extend to chattels real, to trusts under which the judgment debtor had not the whole interest, to equities of redemption, or to any other

The Case of the Creditors of Sir CHARLES COX.†

(In Chancery, before Sir Joseph Jekyll, Master of the Rolls, 1734. 3 Peere Williams, 341.)

Another part of this case was reserved for the further consideration of the court, and was as follows:

Sir Charles Cox possessed of a term for years made a mortgage thereof, and died possessed of the equity of redemption of the said mortgage, and leaving greater debts due from him at his death than his estate would extend to pay. Whereupon the question was, whether this mere equity of redemption was only equitable assets, and distributable equally pro rata, among all the creditors, without regard to the degree or quality of their debts; or whether it should be applied in a course of administration; in which last case the bond creditors would swallow up all the assets, without leaving anything for the simple contract creditors.⁵⁷

And His Honour, after time taken to consider of it, delivered his opinion with solemnity; that this equity of redemption was equitable assets only, the mortgage being forfeited at law, and the whole estate thereby vested in the mortgagee; and it being now become precarious and doubtful, whether it would prove worth redeeming; also, for that the quantum of the money due on the mortgage was uncertain, forasmuch as, when the executors of the mortgagor should

table interest which had been parted with before execution sued out." Mr. Justice Matthews in *Freedman's Savings & Trust Co. v. Earle*, 110 U. S. 710, 714, 4 Sup. Ct. 226, 28 L. Ed. 301 (1884).

In *Scott v. Scholey and Another*, 8 East, 467 (1807), plaintiff sued defendant, as sheriff of Middlesex, for a false return of nulla bona to a writ of fieri facias. The question was whether an equitable interest in a term of years could be sold under a fieri facias. The Court of King's Bench held that it could not.

Lord Ellenborough, C. J., said: "But the very silence of that statute [statute of frauds], which, while it expressly introduces a new provision in respect to lands and tenements held in trust for the person against whom an execution is sued, says nothing as to trusts of chattel interests, affords a strong argument that those interests were meant to continue in the same situation and plight, in respect of executions, in which both freehold and leasehold trust interests equally stood prior to the passage of that statute. In the absence, therefore, of any authority in favor of the sale of such an equitable interest under a common law execution against goods, we are of opinion, upon the grounds already stated, that the sheriff's return of nulla bona in this case, where the defendant in the execution had no other property besides the trust property in question, was not a false return; and of course the verdict which has been obtained by the plaintiff against the sheriff in this case, must be set aside, and a new trial granted."

"Neither the statute of uses, nor the 10th section of the statute of frauds, embrace personal property." *Dunkin, Ch., in Rice v. Burnett*, Speer, Eq. (S. C.) 579, 42 Am. Dec. 336, 588 (1844).

† The title of the cause was *Spencer v. Cox*, Reg. Lib. B. 1734, fol. 113, and was probably the same cause as *Spencer v. Biffen*, cited in 2 Atk. 291, as it appears by the register's book, that Biffen was the maiden name of Sir Charles' second wife.

⁵⁷ A part of the opinion is omitted.

be admitted to redeem, they must pay costs, which in equity are considerable; so that it cannot now be known what the surplus money on the redemption would amount to upon the account taken. Wherefore this right of redemption being barely an equitable interest, it was reasonable to construe it equitable assets, and consequently distributable amongst all the creditors pro rata, without having respect to the decree or quality of their debts; all debts being in a conscientious regard equal, and equality the highest equity; accordingly it was so decreed. But,

Secondly. The court declared, that where a bond is due to A, but taken in the name of B in trust for A, and A dies; this must be paid [*Wilson v. Fielding*, 2 Vern. 763] in a course of administration; for in such case there can hardly be any dispute touching the quantum of the debt, seeing the principal, interest and also the costs, must be paid to the obligee in the bond; whereas in the other case, the costs must be paid by the party coming to redeem. For the same reason, if a term for years be taken in the name of B. in trust for A, this, on the death of A, the cestui que trust, will be legal assets; for here the right to the thing is plain; and if the trustee contests it, he must, prima facie, do it on the peril of paying costs.⁵⁸ * * *

COOK v. GREGSON.

(In Chancery, before Vice Chancellor Kindersley, 1856. 3 Drewry, 547.)

In this cause, which was a suit instituted by a simple contract creditor for the administration of the estate of E. McDonnell, the principal question was, whether certain property of the testator, consisting of the equity of redemption of an equitable interest in a sum (charged upon real estate) which the testator had mortgaged, was equitable assets, and therefore distributable ratably among the creditors of different degrees; or whether it was legal assets, in which

⁵⁸ This decision was followed by Lord Hardwicke in *Hartwell v. Chitters*, Ambler, 308 (1756), and approved by Bayley, J., in *Clay v. Willis*, 1 B. & C. 364, 372 (1823).

In *Sharpe v. Earl of Scarborough*, 4 Ves. Jr. 538 (1799), the Solicitor General, Sir John Mitford (afterwards Lord Redesdale), is reported to have said in argument: "The Case of Sir Charles Cox's Creditors and *Hartwell v. Chitters*, have been considered as overruled. According to them every decree in the common administration of assets in this court is wrong. If leasehold estates are subject to mortgages, there is no conception, that creditors by specialty have not a right to come upon the produce of them, subject to the mortgages. The equity of redemption of a leasehold estate is clearly assets at law; and the executor is charged there with the difference between the value of the estate and the sum he paid in the redemption of it. In the case of a mortgage of a freehold estate the equity of redemption is assets at law; and it cannot be suggested that the specialty creditors are not entitled to their remedy against those estates descended as legal assets; though they cannot be got at but through the medium of a court of equity."

case the specialty creditors would absorb it. The security had been realized, the mortgage paid off, and there was a surplus, which was in court.

THE VICE CHANCELLOR. Much difficulty has sometimes arisen in determining the precise distinction between legal and equitable assets. The general proposition is clear enough, that when assets may be made available in a court of law, they are legal assets, and when they can only be made available through a court of equity, they are equitable assets. This proposition does not, however, refer to the question whether the assets can be recovered by the executor in a court of law or in a court of equity. The distinction refers to the remedies of the creditor and not to the nature of the property. The question is not whether the testator's interest was legal or equitable, but whether a creditor of the testator, seeking to get paid out of such assets, can obtain payment thereout from a court of law, or can only obtain it through a court of equity. This, I apprehend, is the true distinction. If a creditor brings an action at law against the executor, and the executor pleads *plene administravit*, the truth of the plea must be tried by ascertaining what assets the executor has received, and whatever assets the court of law, in trying that question, would charge the executor with, must be regarded as legal assets; all others would be equitable assets.

Supposing, however, this distinction to be well founded, there still remains the question, what property come to the hands of the executor would a court of law consider properly to be taken into account as assets, in trying the truth of the plea *plene administravit*. I think the general principle is that a court of law would treat as assets every item of property come to the hands of the executor, which he had recovered, or had a right to recover, merely *virtute officii*, i. e., which he would have had a right to recover if the testator had merely appointed him executor without saying anything about his property or the application thereof. That I think is the test which, upon principle, a court of law would apply.

Assuming that to be the true principle, suppose, first, that the testator was at his death entitled to a sum of money equitably charged on land; as the executor could recover this merely *virtute officii*, as executor, I apprehend that, when recovered by the executor, it would be legal assets in his hands.

Next, let the same principle be applied to an equity of redemption. When the time fixed for payment of the mortgage money has passed, what is the right of the mortgagor? It is suggested that it is merely a right to repurchase. That certainly is not the view taken of the law in modern times; the unvarying tendency of modern decisions is to treat a mortgage merely as a security, and to treat the mortgagor as being still the real owner. And I think that the view which Wentworth takes in the passage referred to by the learned counsel for the

plaintiff must be considered as much affected by the different light in which the position of the mortgagor was regarded in former times. An equity of redemption is not now considered as a matter of indulgence; it is now a matter of absolute right. And is it not merely by virtue of his office that the executor of a mortgagor who has mortgaged a chattel, comes to this court to redeem? I think it clearly is. If there were nothing in the will but the appointment of executor, would not the executor be entitled simply *virtute officii* to ask for redemption? Clearly he would. A mere administrator might demand it. If so, I confess it appears to me that the general principle as I have stated it, applies to an equity of redemption of a chattel interest, whether real or personal; and that such an equity of redemption would be legal assets.

Now whether those cases which have been cited with respect to the equity of redemption of a mortgaged term of years are to be considered an exception, it is not absolutely necessary for me to determine. If I were called upon to do so, I should say that, in my opinion, those cases are not sustainable, and ought not at this day to be followed.

In this case, it is an equity of redemption of an equitable charge of a sum of money on real estate, which the executor has clearly in my opinion a right, in his mere character of executor, first to redeem, and then to enforce payment of. It is said it is a sort of double-distilled equity; first, there is a mere equity as a charge, and then there is a mortgage of that, and the testator's interest consists of the equity of redemption of that mortgaged equity. That does not, as it appears to me, at all prevent the executor being entitled *virtute officii* to redeem and recover the sum charged; and I am therefore of opinion that the assets here recovered are legal.

The decree was accordingly.

CHRISTY v. COURTENAY.

(In Chancery, before Sir John Romilly, Master of the Rolls, 1858. 26 Beavan, 140.)

Part of the testator's estate consisted of chambers in the Temple, held for lives. These were in 1836 mortgaged to Messrs. Milne for £8,000.

By the decree, the chambers were ordered to be sold, free from the mortgages, in case the mortgagees consented, and the surplus of the produce, after paying the mortgagees, was ordered to be paid into Court, and "that the question whether such proceeds of sale constitute legal or equitable assets be reserved."

The cause now came on for further consideration.

THE MASTER OF THE ROLLS⁵⁹ held * * * that the surplus produce of the chambers formed part of the legal assets of the testator, and directed the plaintiff's costs to be paid out of the funds, and the residue to be applied amongst the specialty creditors.⁶⁰

DUNDAS v. DUTENS.

(In Chancery, before Lord Chancellor Thurlow, 1790. Cited from Opinion of Lord Chancellor Manners in *Grogan v. Cooke*, 2 Ball & Beatty, 230, 233 [1812].)

In the case of *Dundas v. Dutens*, 1 Ves. Jr. 196, 2 Cox, Eq. Cas. 235, the question was, whether stock that had been settled, could be brought within the reach of creditors; I have a note of that case, which, on this point, is more full than the printed report of it, which I will briefly state. Lord Thurlow says: "Is there any case where stock standing in a trustee's name, can be made available to pay debts, or that debts (and stock is chose in action) shall be transferred to creditors for that purpose? You cannot have an execution at law against such effects. The opinion in *Horn v. Horn* [Ambler, 79], is so anomalous and unfounded, that forty such opinions would not satisfy me. It would be preposterous and absurd to set aside an agreement, which, if set aside, leaves the stock in the name of a person where you could not touch it."⁶¹

⁵⁹ A part of the opinion is omitted.

⁶⁰ See *Shee v. French*, 3 Drew. 716 (1857); *Mutlow v. Mutlow*, 4 De G. & J. 539 (1859).

It seems, in view of these later decisions, safe to say that all equitable interests coming to a legal representative or heir as such are distributable in the same manner as legal interests, on the principle that equity follows the law.

Equitable assets, that is, assets distributable equally among all the creditors of a deceased person, could be created only in the case of realty, when the same was either devised in trust to be sold to pay the debts of the testator, or charged with payment of such debts.

For a long time it was held that, if the devise were to the executor or heir of the testator, the assets would be legal, and not equitable. *Dethicke v. Caravan*, 1 Lev. 224 (1667); *Girling v. Lee*, 1 Vern. 63 (1682); *Hawker v. Buckland*, 2 Vern. 106 (1689); *Blatch v. Wilder*, 1 Atk. 420 (1738); *Plunket v. Penson*, 2 Atk. 290 (1742); *Fremoult v. Dedire*, 1 P. Wms. 429 (1718); *Allam v. Heber*, 2 Stra. 1270 (1748); *Cutterback v. Smith*, Prec. Chy. 127 (1700); *Bickham v. Freeman*, Prec. Chy. 136 (1700).

These cases have been overruled, and land devised to any one for the payment of debts must be applied equally among all creditors. *Silk v. Prime*, 1 Bro. C. C., 138, note (1768); *Newton v. Bennet*, Bro. C. C. 135 (1782); *Bailey v. Ekins*, 7 Ves. Jr. 319 (1802); *Shiphard v. Lutwidge*, 8 Ves. Jr. 26 (1802); *Helm v. Darby's Adm'r*, 3 Dana (Ky.) 185 (1835); *Cloudas' Ex'r v. Adams*, 4 Dana (Ky.) 603 (1836); *Speed's Ex'r v. Nelson's Ex'r*, 8 B. Mon. (Ky.) 499 (1848); *Benson and Others, Ex'rs, v. Le Roy and Others*, 4 Johns. Ch. (N. Y.) 651 (1820).

⁶¹ *Caillaud v. Estwick*, 2 Anst. 381, 384, 385 (1794); *Nantes v. Corrock*, 9 Ves. Jr. 182 (1803); *Rider v. Kidder*, 10 Ves. Jr. 360 (1805); *Plasket v.*

Lord Dillon, 1 Hogan, 324 (1825). *Contra*: McCarthy v. Goold, 1 B. & B. 387 (1810).

Horn v. Horn, Ambler, 79 (1749); Taylor v. Jones, 2 Atk. 600 (1743); Hadden v. Spader, 20 Johns. (N. Y.) 554 (1822), s. c. 5 Johns. Ch. (N. Y.) 280 (1821); Storm v. Waddell, 2 Sands. Ch. (N. Y.) 494 (1845). See, however, Donovan v. Finn, Hopk. Ch. 59 (1823).

In England a debtor's interest in a legal chose in action could be reached by his creditors neither at law nor in equity. Bank of England v. Lunn, 15 Ves. Jr. 569 (1809); Guy v. Pearkes, 18 Ves. Jr. 196 (1811); Crogan v. Cooke, 2 Ball & Beatty, 230 (1812); Cockrane v. Chambers, Ambler, 79, note (1) (1825); Sims v. Thomas, 12 A. & E. 536 (1840); Otley v. Lines, 7 Price, 274 (1819).

The English rule was adopted in the following cases: Shaw v. Aveline, 5 Ind. 380 (1854); Stewart v. English, 6 Ind. 176 (1855); Williams v. Reynolds, 7 Ind. 622 (1856); Buford v. Buford, 1 Bibb (Ky.) 305 (1808); Winebrinner v. Weisiger, 3 J. B. Mon. (Ky.) 32 (1825); McFerran v. Jones, 2 Litt. (Ky.) 219 (1822); Cosby v. Ross' Adm'r, 3 J. J. Marsh. (Ky.) 290, 20 Am. Dec. 140 (1830); Hardenburgh v. Blair, 30 N. J. Eq. 647 (1879); Greene v. Keene, 14 R. I. 388, 51 Am. Rep. 400 (1884); Maxon v. Gray, 14 R. I. 641 (1885); Ewing v. Cantrell, Meigs (Tenn.) 364 (1838); Erwin v. Oldham, 6 Yerg. (Tenn.) 185, 27 Am. Dec. 458 (1834); White Sewing Mach. Co. v. Atkeson, 75 Tex. 330, 12 S. W. 812 (1889); Carter Bros. & Co. v. Hightower, 79 Tex. 135, 15 S. W. 223 (1890).

In the following cases a legal chose in action was reached by a bill for an equitable execution: Watkins v. Dorsett, 1 Bland. (Md.) 530 (1828); Sargent v. Salmond, 27 Me. 539 (1847); Drake v. Rice, 130 Mass. 410 (1881); Wright v. Petrie, Smedes & M. Ch. (Miss.) 282 (1843); Catchings v. Manlove, 39 Miss. 655 (1861); Tappan v. Evans, 11 N. H. 311 (1840); Abbott v. Tenney, 18 N. H. 109 (1846); Chase v. Searles, 45 N. H. 511 (1864); Bayard v. Hoffman, 4 Johns. Ch. (N. Y.) 450 (1820); Weed v. Pierce, 9 Cow. (N. Y.) 722 (1827); Proseus v. McIntyre, 5 Barb. (N. Y.) 424 (1849); McGill v. Harman, 55 N. C. 179 (1855); Burton v. Farinholt, 86 N. C. 260 (1882). See, however, Doak v. Bank, 28 N. C. 309, 335-338 (1846).

CHAPTER IV.

EXTINGUISHMENT OF A TRUST.

SELBY v. ALSTON.

(In Chancery, before Sir Richard Pepper Arden, Master of the Rolls, 1797.
3 Ves. Jr. 339.)

James Selby having contracted for the purchase of certain estates in the counties of Middlesex and Hertford and the isle of Ely, and having paid the purchase money, afterwards by his will gave and devised "all the rest of my real and personal estate whatsoever and wheresoever to my said wife in trust, that she do thereout educate and maintain my said son until he shall attain the age of twenty-one years, and until he shall have sufficiently settled and secured to and upon my said wife what is to be settled upon and given to her, as aforesaid; and afterwards in trust to convey and dispose of all the then rest of my real and personal estate and the produce thereof to my said son, his heirs, executors and assigns; but in case my said son shall die, without issue, before he shall attain his age of twenty-one years, then in trust," etc.

The testator died before any conveyance was made of the estates agreed to be purchased. After his death a conveyance by lease and release was made to his widow; who died before her son attained the age of twenty-one. He afterwards attained the age; and died in 1772, having been always in possession of these estates from the death of his mother, and having devised them to charitable uses; which devise was void by the statute of mortmain [9 Geo. II, c. 36].

The bill was filed by the heir at law *ex parte paterna*, claiming these estates against the heir *ex parte materna*; who was in possession. The defendant put in a general demurrer.

Solicitor General [Sir John Mitford] for the plaintiff. The question is, as to the equity of the plaintiff. The ground of his coming here is, that the legal title is with the defendant. The son being entitled in both capacities, as heir *ex parte paterna*, and *ex parte materna*, that made it a question of election; and it might not have been the same to him to take in either character; for his mother might have died considerably indebted. If the equitable estate merges in the legal, a *cestui que trust* happening to be heir of his trustee must be liable to all the judgments of the trustee.

The Master of the Rolls suggesting that this point had been before Lord Thurlow, and Mr. Mansfield and Mr. Stratford, who supported the demurrer, saying it had been determined by Lord Thurlow in favor of the heir *ex parte materna* upon this very will in *Hone v. Med-*

craft and Franklin v. Alston, 23d April, 1779, it was ordered to stand over, that it might be inquired into; the Master of the Rolls saying, if that was so, it would not be proper for him, sitting for the Lord Chancellor, to give any opinion upon it.

March 22d. MASTER OF THE ROLLS. Upon looking into this case, I have no objection to give my opinion; as, if it was decided by Lord Thurlow, my opinion is the same as his.

The ground of this bill is, that the plaintiff, claiming as heir ex parte paterna of the late Mr. Selby, has an equity to call for a conveyance. The case and the premises, or at least some of them, are exactly the same as in Goodright v. Wells, Doug. 771. When this was mentioned, it occurred to me, that the question had been already decided by Lord Thurlow in some other cause. After a verdict at law, and a judgment determining that at law it descended to the heir ex parte materna, with a very strong opinion of three of the judges, that equitably the heir ex parte paterna could have no claim, though one judge gave an opinion to the contrary, it does appear that the point, whether argued or not, came on before Lord Thurlow. The Register's book contains farther directions in two causes. Both bills were restrained twelve months; and it was ordered that Wells and the Franklyns, claiming as heirs upon the part of his father's mother, should bring an ejectment; that Sir Rowland Alston, claiming on the part of the mother, should also bring an ejectment; that there should be a trial at bar; and that Sir Rowland Alston might also attend at the trial of the ejectment brought by the Wells's. The ejectment was under the direction of this court; that is certain. Upon farther directions his Lordship declared, that the devise in the will of the several freehold and leasehold estates thereby given to the charity was void; and it was ordered, that the title deeds of the estates in St. Clements's church yard and at Hertingfordbury should be delivered to Sir Rowland Alston, who recovered in the ejectment; and that the receiver should be discharged.

If any equity remained between these heirs, this decree could not have been made. The equitable point was raised in the court of law; and the judges gave their opinions upon it; and Lord Thurlow delivered up possession to the person claiming as heir ex parte materna.

Then the next question is, whether upon the case made by the plaintiff he is entitled to an equity. The question at law was clear; there could be no question about that; but the judges intimated their opinion upon the equitable point. The argument of Mr. Justice Wilson was more equitable than legal. We have an intimation of the opinion of Lord Mansfield and a strong opinion of Judges Ashurst and Buller against the equity. Mr. Justice Willes's opinion was in favor of the equity. The question now is, whether upon the case now coming before a court of equity the opinion of the three judges is such as this court will follow. I do not say, the case is free from all difficulty; and there may be good reason to contend, that the sit-

uation of the trustee shall not affect in any degree the estate coming from him to the cestui que trust; but I must not lay that down too broadly; for that is not the fact. In *Philips v. Brydges* [3 Vesey, Jr. 126] I stated as a universal proposition that wherever the legal and equitable estates uniting in the same person are co-extensive and commensurate, the latter is absorbed in the former. I stated, and think I was warranted in so doing, that no act of the trustee can in any degree vary the right of the cestui que trust; but I did not state, nor upon full consideration am I prepared to say, that it was ever held, that the situation of the trustee, and the operation of law arising from that situation, and the relation to the cestui que trust, does not make considerable difference in the estates to be taken; as for instance: Supposing the trustee was an ancestor of the cestui que trust, and dies; and then the cestui que trust dies: Is there any doubt that his widow would be dowable; though if the cestui que trust died first, she unquestionably would not. It has been argued, that the trustee is a mere instrument, and his situation or act can have no effect at all upon the estate. I have put a case, where the fact being that the legal estate descends upon the cestui que trust and is united with the trust estate, he becomes solely seized at law; and both his widow and heir are entitled. Therefore the situation of the trustee (I do not say, his act) may make a considerable difference. If the widow of Mr. Selby had conveyed to the son, it is clear he would have taken an estate descendible to his heirs ex parte paterna. Suppose she had made a feoffment to the use of herself for life, remainder to her son; she would have had no intention of giving the estate in any new line (it is to be supposed, she would rather it should continue in the line that would carry it to her own heirs); but that act, though not done with that view, would have such an effect. So, where an heir takes by devise instead of by descent, the consequences are different; but that was never insisted on as a ground of equity. If an heir ex parte materna takes by devise, that would let in his heirs ex parte paterna, and if they fail, his heirs ex parte materna also; if he takes by descent, he would only take an estate descendible to his heirs ex parte materna; and yet, if he can take by descent, the law makes him take so. The case of an escheat does seem a hardship upon the line of heirs that would have succeeded, if Mr. Selby had taken from his father. That is the only argument that pressed upon my mind. Where the person himself has an equal, coextensive, estate at law and in equity, the legal shall prevail notwithstanding the case I put of the escheat. I have not found that courts of equity have ever, upon that circumstance, held that he is not to be considered as having a coextensive estate in law and equity.

The case relied upon in *Philips v. Brydges* was *Wade v. Paget*, 1 Bro. C. C. 363. There Lord Thurlow lays down a universal proposition, to which I am inclined to accede; that where the estates unite, the equitable must merge in the legal. That was the principle of the

opinion of the judges in *Goodright v. Wells*; and upon consideration I am inclined not to lay any restriction upon or to narrow it in any respect, but to hold, that by whatever means, whether by conveyance or otherwise, a person obtains the absolute ownership at law of the estate, though he acquired that by an equitable title, and both either come together or are afterwards united in him, the legal will prevail, the equitable is totally gone for the purpose of being acted upon by any person in this court. Therefore, that being laid down universally, this demurrer must be allowed against the plaintiff claiming as heir ex parte paterna.

MATTHEWS, Administrator, v. THOMPSON and Others.

THOMPSON and Others v. SAME.

(Supreme Judicial Court of Massachusetts, 1904. 186 Mass. 14, 71 N. E. 93, 66 L. R. A. 421, 104 Am. St. Rep. 550.)

Two bills in equity filed respectively November 19, 1900, and August 6, 1900, one by Nathan Matthews, Jr., administrator with the will annexed of the insolvent estate of Edward Thompson, seeking to set aside, as fraudulent and void as against the creditors of that estate, a conveyance of certain land on Huntington Avenue, made by Edward Thompson through a third person to the defendant V. Mabel Thompson, or, in the alternative, to have the defendant V. Mabel Thompson declared a trustee for the benefit of the plaintiff as administrator; the other by Henry Thompson, Elizabeth B. Thompson and Frances M. Thompson, the brother and sisters of Edward Thompson, seeking to establish a trust in the land for their benefit.

The cases were heard together by Barker, J., who reports them for determination by the full court, such decrees to be entered as justice and equity might require.

KNOWLTON, C. J.¹ Edward Thompson, the testator of the plaintiff in the first suit, became indebted from time to time in a considerable sum to his unmarried sisters, Elizabeth B. Thompson and Frances M. Thompson, who were old ladies unfamiliar with business. Of his own motion, he made to them, as security, a mortgage of the real estate in question, subject to other mortgages, which together amounted to about \$37,000, and afterwards he caused them to foreclose this mortgage. A conveyance of the property, subject to the prior mortgages, was made to his son, who held it as agent of these sisters of the testator. Subsequently the testator caused his son to convey the property to the testator's nephew, one Eldridge, who executed a declaration of trust for the benefit of the old ladies, to secure them for their previous mortgage debts, and also for the benefit of their brother, Henry Thompson, to secure him for any advancements that he might make to Edward Thompson, and any other claims that he might hold

¹ Part of the opinion is omitted.

against Edward. The declaration of trust also provided that after the payment of these debts the trustee should pay the balance, if any, to Edward Thompson. This declaration was not acknowledged nor recorded. It was understood that Edward Thompson was to have the entire management of the property, and these arrangements for security were made at his suggestion. At the end of about a year and a half, at his request, a paper was signed by the beneficiaries and sent to Eldridge, as follows:

"Mr. William T. Eldridge,

"September 16th, 1896.

"Dear Sir: We hereby request and authorize you to convey to Edward Thompson the real estate in Boston conveyed to you by Frederick P. Thompson.

Henry Thompson.

"Elizabeth B. Thompson.

"Frances Mary Thompson."

The testator enclosed this paper to Eldridge and asked him for a conveyance of the real estate. Thereupon, on October 6, 1896, Eldridge conveyed the land to Edward Thompson by a deed which was duly recorded, and which contained no reference to a trust. The deed was in the form of an ordinary quitclaim purporting to be for a consideration of \$1 paid by Edward Thompson, not describing him as trustee, and it contained a warranty that the premises were free from all incumbrances made or suffered by Eldridge, and a warranty against the lawful claims and demands of all persons claiming by, through or under him. This deed was delivered by Eldridge to Edward Thompson and was duly recorded. After this conveyance Edward Thompson held the land as if it were his own, mortgaged it several times for his own debts, had repeated negotiations for the sale of it, and treated it in all respects as if he were the absolute owner of it. The first question in the cases is whether he held it charged with a trust in favor of his brother and sisters, so that it still remains subject to this trust in the hands of his widow, to whom it was afterwards conveyed in his lifetime.

In reference to the transfer from Eldridge to the intestate, the presiding justice found "as a fact that the intention of all parties interested, including that of the retiring trustee, Mr. Eldridge, was not that Mr. Edward Thompson should hold as trustee." He found, "that the intention of his brother and sisters and of the retiring trustee was that the title should go back to him, Edward Thompson, and that the brother and sisters relied upon his saying what he would do in regard to their debts, not because he was a trustee, but because he was their brother and they were willing to trust him."

As all the parties were of full age, and as the trust was created by an arrangement to which the trustee and the cestuis que trust were the only parties, there is no doubt that they could terminate it at any time. *Smith v. Harrington*, 4 Allen (Mass.) 566; *South Scituate Savings Bank v. Ross*, 11 Allen (Mass.) 442; *Sears v. Choate*, 146 Mass. 395, 15 N. E. 786, 4 Am. St. Rep. 320; *Brown v. Cowell*, 116 Mass.

461. Upon the findings of the judge, it is plain that they undertook to terminate it and supposed that they had terminated it. The plaintiffs in the second suit, the former cestuis que trust, rely upon the Pub. St. c. 120, § 3 (Rev. Laws, c. 127, § 3), which provides that "No estate or interest in land shall be assigned, granted, or surrendered unless by such writing [an instrument in writing signed by the grantor or by his attorney] or by operation of law." The kind of instrument in writing required under this section depends upon the nature of the interest to be assigned or surrendered. In the present case, not only the legal estate, but by the record title an absolute estate in fee, including equitable interests, as well as legal, was in Eldridge. This title was affected only by an unacknowledged and unrecorded paper. By his deed to Edward Thompson, Eldridge assigned and conveyed, according to the record, a perfect title subject to prior mortgages. This deed was an instrument in writing. The only additional instrument required by the statute was a writing which would relieve the grantor from the consequences of what would have been a breach of trust if he had acted without authority from the cestuis que trust. Nothing more was needed to pass a title which was free from equities. As applied to conditions like the present, we are of opinion that the assignment of the equitable rights of the plaintiffs in the second suit, made by a deed of one who held of record a perfect title and who acted under their authority given in writing was a compliance with the statute. If we consider it as a surrender of equitable rights, we are of opinion that the paper which they signed was all the instrument required by the statute, it being given as an authority to be acted upon, and which was in fact acted upon, by the trustee who held of record an absolute title. The principle is analogous to that which has been applied to the surrender and cancellation of an unrecorded deed of defeasance, given in connection with an absolute deed to constitute a mortgage. When this is done in good faith, and is subsequently acted upon by the person to whom the surrender is made, the original holder is estopped from setting up the surrendered instrument against the existing title. *Trull v. Skinner*, 17 Pick. (Mass.) 213; *Falis v. Conway Ins. Co.*, 7 Allen (Mass.) 46, 49. See, also, as to parol waiver by cestuis que trust, under the statute of frauds, *Kline's Appeal*, 39 Pa. 493; *Miller v. Pierce*, 104 N. C. 389, 10 S. E. 554; *Gorrell v. Alspaugh*, 120 N. C. 362, 368, 27 S. E. 85. The action of the parties, taken in good faith, makes it impossible in equity for the cestuis que trust to hold the trustee for a violation of his duty in making the conveyance, or to charge the conscience of the grantee having knowledge of the previous trust, with a duty to hold subject to the trust.² * * *

² *Ormsby v. Dumesnil*, 91 Ky. 601, 16 S. W. 459 (1891); by the exhaustion of the cestuis que trust, *Burgess v. Wheate*, 1 Wm. Bl. 123 (1759); by the escheat of the legal title to land held in trust, *King v. Mildmay*, 5 D. & Ad. 254 (1833).

See note to this case, 18 H. L. R. 53, 54.

CHAPTER V.

THE DUTIES OF A TRUSTEE.

SECTION 1.—TO CONVEY THE TRUST RES AS THE
CESTUI QUE TRUST MAY DIRECT.

WATTS v. TURNER.

(In Chancery, before Sir John Leach, Master of the Rolls, 1830. 1 Russel & Mylne, 634.)

A trust estate descended to the defendant; and the plaintiff, who was cestui que trust, being entitled to the legal estate, a draft of the intended conveyance was sent to the solicitor of the defendant, and approved of by him. The defendant afterwards refused to execute the conveyance, unless the plaintiff paid him a sum of money. The bill was filed to compel a conveyance.

THE MASTER OF THE ROLLS made the decree against the defendant, with costs.¹

¹ Cary, 13; Jones v. Lewis, 1 Cox, 199 (1786); Willis v. Hiscox, 4 Myl. & Cr. 197 (1838); Holford v. Phipps, 3 Beav. 434 (1841); Thorby v. Yeats, 1 Y. & C. C. C. 438 (1842); Campbell v. Home, 1 Y. & C. C. C. 664 (1842); Penfold v. Bouch, 4 Hare, 271 (1844); Firmin v. Pulham, 2 De G. & Sm. 99 (1848); Devey v. Thornton, 9 Hare, 222 (1851); King v. King, 1 De G. & J. 663 (1857); Palaioret v. Carew, 32 Beav. 564 (1863); In re Knox's Trusts, L. R. 1 Ch. 538 (1895); Pearce v. Bryant Coal Co., 25 Ill. App. 51 (1887); Warren v. Ireland, 29 Me. 62, 68 (1848); Paine v. Forsaith, 86 Me. 357, 30 Atl. 11 (1894); Tilton v. Davidson, 98 Me. 55, 56 Atl. 215 (1903); Jasper v. Maxwell, 16 N. C. 357 (1830); Reid v. Gordon, 35 Md. 174 (1871); Hunnewell v. Lane, 11 Metc. (Mass.) 163 (1846); Smith v. Harrington, 4 Allen (Mass.) 566 (1862); Bowditch v. Andrew, 8 Allen (Mass.) 339 (1864); Stone, Petitioner, 138 Mass. 476 (1885); Slater v. Hurlbut, 146 Mass. 308, 15 N. E. 790 (1888); Whall v. Converse, 146 Mass. 345, 15 N. E. 660 (1888); Sears v. Choate, 146 Mass. 395, 15 N. E. 786, 4 Am. St. Rep. 320 (1888); Felton v. Sawyer, 41 N. H. 202 (1860); Archer v. American Waterworks Co., 50 N. J. Eq. 33, 24 Atl. 508 (1892); Turnage v. Greene, 55 N. C. 63, 62 Am. Dec. 208 (1854); Matthews v. McPherson, 65 N. C. 189 (1871); Taylor v. Huber, 13 Ohio St. 288 (1862); Megargee v. Naglee, 64 Pa. 216 (1870); Hepburn's Appeal, 65 Pa. 468 (1870); Culbertson's Appeal, 76 Pa. 145 (1874); Sharpless' Estate, 151 Pa. 214, 25 Atl. 44 (1892); Fisher v. Wister, 154 Pa. 65, 25 Atl. 1009 (1893); Clark's Estate, 15 Phila. (Pa.) 573 (1882); Hubbs' Estate, 16 Phila. (Pa.) 211 (1883); Ives v. Harris, 7 R. I. 413 (1863); Taylor v. Taylor, 9 R. I. 119 (1868); Rogers v. Rogers, 10 R. I. 556 (1873); Nightingale v. Nightingale, 13 R. I. 113 (1880); Whelan v. Reilly, 3 W. Va. 597, 613 (1869).

Contra: Ring v. McCoun, 10 N. Y. 268 (1851); Lent v. Howard, 89 N. Y. 169 (1882); Asche v. Asche, 113 N. Y. 232, 21 N. E. 70 (1889); Cuthbert v. Chauvet, 136 N. Y. 326, 32 N. E. 1088, 18 L. R. A. 745 (1893); Metcalfe v. Union Trust Co., 181 N. Y. 39, 73 N. E. 498 (1905); Lewis' Estate, 3 Misc. Rep. 164, 23 N. Y. Supp. 287 (1893).

In Turner v. Buck, 22 Vin. Abr. 21, pl. 5 (1715), Lord Chancellor Cowper refused to direct a trustee to convey the legal title to the cestui que trust, so

GOODSON v. ELLISSON.

(In Chancery, before Lord Chancellor Eldon, 1827. 3 Russell, 583.)

ELDON, Lord Chancellor.² In 1767 a deed was executed, and I will assume that a fine was properly levied in pursuance of it, by which an estate was granted and conveyed to Richard Ellisson and his heirs on certain trusts. The bill deduces the various changes of the title to the equitable interest, which occurred between 1767 and November, 1822, bringing it, in 1819, into eight different persons, each of whom is represented as the owner of an undivided eighth part of the property.

These eight persons sell the property in different lots to different persons; and, the present plaintiff having bought one of the lots, a deed is prepared, conveying certain parcels of land to him; that deed the eight persons, who are represented as the owners of the beneficial interest, have executed; and the co-heiresses of Richard Ellisson are also required to execute it. They refuse, and the bill is filed. * * *

The Master of the Rolls has ordered the defendants to execute the conveyance, and to pay the costs of the suit.

Now, even if the plaintiff had been the purchaser of the whole estate, and the conveyance had related to the whole, it would have been a matter for consideration, whether the trustees would not have a right, where there has been so much devolution of title, to have the title examined in this Court, instead of being required to acquiesce in an opinion which was not clothed with the sanction of judicial authority. But this plaintiff is the purchaser of only sixteen acres of the property, and the rest of the estate has been sold to other persons in different lots. Now, I confess it is quite new to me, to be informed that you can call on a trustee from time to time to divest himself of different parcels of the trust estate, so as to involve himself as a party to conveyances to twenty different persons. Has not a trustee a right to say, "If you mean to divest me of my trust, divest me of it altogether, and then make your conveyances as you think

that the latter might maintain an ejectment against the purchaser for value without notice of the plaintiff's rights.

It seems that the trustee will be compelled to convey a legal title only commensurate with the equitable interest of the cestui que trust. *Saunders v. Nevil*, 2 Vern. (Raithby's Ed.) 428 (1706); *Talbot v. Whitfield*, Bunbury, 204 (1725).

In *Dawkins v. Penrhyn*, 4 App. Cas. 51 (1878) at page 60, Lord Chancellor Cairns said: "I can conceive, although it would be a strange and unusual mode of conveyancing, a conveyance or devise to a man and the heirs of his body in trust for A. B. and his heirs; and then the estate tail would be held in trust for A. B., and A. B. could call upon the tenant in tail, I dare say, to bar the estate tail, and to enlarge it into a fee for his benefit."

If the trustee has a legal title in fee simple, and the cestui que trust an interest in tail, it seems that the cestui que trust can bar the equitable interest in tail, and enlarge it into an equitable fee simple, and then compel the trustee to convey to him a fee. See *Pearson v. Lane*, 17 Ves. Jr. 101 (1809).

² Only a part of Lord Eldon's opinion is given.

proper." I have been accustomed to think, that a trustee has a right to be delivered from his trusts, if the cestuis que trust call for a conveyance.

Another principle which has been lost sight of in this decree, is, that a trustee can be called on to convey only by the words and descriptions by which the conveyance was made to him. In this respect, he is like a mortgagee.

I see nothing in the record which would have hindered me from directing these ladies to convey, if I had such parties before me as would have enabled me to direct a conveyance of the whole estate. If the cestuis que trust had all been here, they might have prayed that the sixteen acres in question might be conveyed to Goodson, and the residue of the estate to a trustee on trust to convey to other purchasers. As the suit is framed, I cannot take that course.

The following decree was made: "His Lordship doth order, that the decree made in this cause, the 18th of August, 1824, be reversed; and it is ordered, that it be referred to the Master to inquire and state to the Court, whether the plaintiff is entitled to that beneficial interest which he seeks to have clothed with a legal estate by conveyance; and in making the said inquiry, it is ordered, that the Master do ascertain and state to the Court whether all prior vested and contingent equitable titles have failed by deaths or nonexistence of persons who would have taken before the plaintiff, etc. And it is ordered, that the said Master do tax the costs of the defendants of this suit to this time, including their costs of the appeal, as between party and party, that the same, when taxed, be paid by the plaintiff to the defendants; but this taxation is to be without prejudice as to whether the defendants shall not be finally entitled to any further costs, charges and expenses; and his Lordship doth reserve the consideration of all further directions, and whether the defendants shall be allowed any further costs, charges and expenses up to this time, and also the consideration of all subsequent costs, charges, and expenses, until after the Master shall have made his report." ³

SMITH and SNOW v. SNOW and Others.

(In Chancery, before Sir John Leach, Vice Chancellor, 1818. 3 Maddock, 10.)

The plaintiff Smith was the assignee of the plaintiff Snow's seventh part or share in certain funds standing in the name of trustees, two of the defendants. The plaintiffs Smith and Snow filed their bill against the trustees, and against six of the cestuis que trust, brothers

³ In *Rhoads v. Rhoads*, 43 Ill. 239 (1867), *Gunn v. Brown*, 63 Md. 96 (1884), *Seamans v. Gibbs*, 132 Mass. 239 (1882), *Zabriskie's Ex'rs v. Wetmore*, 26 N. J. Eq. 18 (1875), and *Hutchison's Appeal*, 82 Pa. 509 (1876), a bill filed by one of several cestuis que trust for the transfer to him of his share of the trust

and sisters of the plaintiff Snow, to have the seventh part or share of the plaintiff Snow transferred to the plaintiff Smith. To this bill, four of the defendants, brothers and sisters of the plaintiff Snow (two of the defendants, his brothers, being out the jurisdiction) put in the following demurrer:

"These defendants, etc. for cause of demurrer show that no relief is prayed by the bill against the defendants, and that the said complainants have not by their said bill made such a case as entitles them in a court of equity to any discovery from or against these defendants, touching the several matters in the bill of complaint mentioned, or any of them, or as entitles them to any relief or assistance against the defendants. Therefore," etc.

THE VICE CHANCELLOR. The question is, whether a party who is entitled to a certain aliquot proportion of a certain ascertained sum, can file a bill to have it transferred to him, without making the persons entitled to other aliquot shares of the fund, parties. Persons not interested in the suit cannot be made parties, and it is sufficient to say that it is not alleged that these defendants have any interest in this suit. My only difficulty is, whether trustees can be called upon to act in execution of their trust, by parts, as in that case seven different bills might be filed against them; but that I think is not so great an inconvenience as the allowing of such a bill as this would be.⁴

Demurrer allowed.

TAYLOR and Wife v. Executors of HUBER and Others.

(Supreme Court of Ohio, 1862. 13 Ohio St. 288.)

On the 11th of October, 1844, Jacob Huber made his will, in which he bequeathed to his son, Martin Huber, an equal share of his estate. The testator, Jacob, survived his son Martin, who died May 26, 1846, and on April 16, 1847, made this codicil to his will:

"My son Martin, having departed this life since I made my said will, leaving a widow and children, I do declare, will and direct that the said children of Martin shall succeed to the distributive share which would otherwise have accrued to said Martin, in case he had

property was dismissed; not, however, on the ground urged by Lord Eldon, but out of regard to the intention of the creator of the trust.

In *Russell v. Grinnell*, 105 Mass. 425 (1870), *Cooper v. Cooper*, 36 N. J. Eq. 121 (1882), and *Estate of Moss*, 15 Phila. (Pa.) 516 (1882) an equitable tenant for life was refused a conveyance of a legal life estate.

⁴ In *Re Radcliffe*, L. R. 1 Ch. 227 (1892), *Inches v. Hill*, 106 Mass. 575 (1871), *Williams v. Thacher*, 186 Mass. 293, 71 N. E. 567 (1904), *Welch v. Episcopal Theological School*, 189 Mass. 108, 75 N. E. 139 (1905), and *Estate of Henderson*, 15 Phila. (Pa.) 598 (1882), one of several cestuis que trust obtained a conveyance of his share of the trust property.

See *Wetmore v. Zabriskie*, 29 N. J. Eq. 62 (1878), and *Terry v. Smith*, 42 N. J. Eq. 504, 8 Atl. 886 (1887), as to the partibility of a trust.

survived me. Provided, however, that the interest of one third part of said share shall be paid annually to the widow of said Martin, during her natural life, the principal of said one third part to be distributed to the children, or their heirs, of said Martin, after the death of his said widow. And to the end, that the interest may be raised on said one third part, for said widow, and the principal be secured, I do direct that my executors, when the money shall come into their hands, shall loan the same upon bond and mortgage on real estate, and the interest to be paid annually. The money which is to accrue to said children of Martin, shall be paid to them as they become of age; and, until that time, shall be loaned on bond and mortgage as aforesaid, except such part as may be necessary for their support."

The children of Martin Huber, mentioned in this codicil, were David and Levi, then living; and their mother, the widow of said Martin, is the present plaintiff, Sarah Taylor, since intermarried with her co-plaintiff, Levi Taylor.

The testator, Jacob Huber, died in April, 1849. His will, with the codicil thereto, was admitted to probate, and letters testamentary were granted to the executors, the present defendants, in May, 1849.

After the death of the testator, David and Levi, the children of Martin Huber, both died intestate, minors, free of debt, unmarried, and without children, leaving no brothers or sisters of the whole or half blood. David died first.

The plaintiffs, Sarah Taylor and Levi Taylor, her present husband, filed their petition against the executors of said testator, in the court of common pleas of Fairfield county, stating the foregoing facts; whereby they claim that the said Sarah, the mother of the deceased children of Martin Huber, as their heir at law, became entitled to succeed to their property and estate, and to demand and receive from said executors, by virtue of said codicil to the will of said Jacob Huber, the principal of the one third of the distributive share directed in said codicil to be distributed "to the children, or their heirs, of said Martin, after the death of his said widow," the said Sarah, being one third of \$3,624.80, or \$1,208.27, the executors having paid to her the other two thirds.

The petition further states, that the executors have invested said sum of \$1,208.27, or put the same at interest for a long period of years; and the plaintiffs demand judgment against the executors for said sum, with interest from the date of the last payment of interest; but if the executors are not bound personally to pay said sum, that then they may be decreed to assign to said Sarah all notes, bonds, mortgages, etc., they may hold for the payment of said sum, to her sole and separate use, etc.

The petition further states, that on January 19, 1860, James A. Bope, was appointed administrator of the estate of said children, David and Levi, and claims as such an interest in said \$1,208.27, adverse to the plaintiffs. He is made a defendant, and with a prayer that he

be required to answer, and be restrained from collecting or interfering with said sum.

As a second cause of action, the petition alleges the non-payment of interest on the \$1,208.27 for several years, of which an account is prayed and judgment for the amount.

To so much of the petition as seeks a recovery of the principal of the one third of the legacy given by the codicil to the children of Martin Huber, deceased, the executors of the will demur, on the ground that the facts stated do not constitute a cause of action.

To the second cause of action, said executors answer, admitting a balance of \$46.35, on interest, on said \$1,208.27, due April 4, 1859, and offer to pay the plaintiffs that sum.

Bope, as the administrator of Martin Huber's deceased children, answers, claiming title and right to the fund, and prays judgment for the same against his co-defendants, the executors of Jacob Huber, or for the securities evidencing its investment.

The executors demur to Bope's answer, on the ground that it shows no cause of action against them.

The district court reserved the case to this Court for decision.

BRINKERHOFF, J. There is no controversy among counsel in this case, but that on the death of the testator, the legacy bequeathed by his will became vested in his grandsons, David and Levi, though subject to the charge upon it in favor of their mother during her life; that on the death of David, his share of it passed by descent, subject to administration, to Levi, and on his death, no provision having been made in the will for these contingencies, that the whole passed by descent, subject to administration, to their mother, the plaintiff, as their next of kin.

And it is claimed, in behalf of the administrator of the infants, in effect, that inasmuch as a regular course and succession of administrations, settlements, and distributions, with their attendant costs, charges and consequent depletions of the original legacy, would be a regular course of proceeding at law, therefore the whole formula of such a course must be followed; and that the interest of the mother can reach her only through this course of administrative distributions. While, on the part of the executors of the testator, it is claimed, that under the provisions of the will, they have the right to retain the fund until her death; that what she has inherited though then payable to her heirs, shall never reach her at all.

We cannot accede to either of these claims. Although a course of successive administrations and distributions would be regular at law, there is here no occasion for it, the children having left no debts to be paid or adjusted, and it would be dilatory and expensive. The executors from the first held this fund in trust for the grandsons of the testator by the provisions of the will; and now, through a contingency not foreseen or provided for by the will, that trust having wholly failed, they, by operation of law, hold it in trust for their

heir, the mother. The title of the administrator of the infants, is subject to the like trust. These trusts equity has ample jurisdiction to enforce and in proper cases, like this, will do so. *Cram v. Green*, 6 Ohio, 429; *Stiver v. Stiver*, 8 Ohio, 217; 1 Story's Eq. § 593.

A decree may be entered in favor of the plaintiff, Sarah Taylor, ordering the executors to deliver to her the securities in their hands, representing the fund in controversy, subject to any just and proper charges in their favor, which they may have incurred in its administration, and remaining unpaid; and subject also to such costs and expenses of administration on the estates of the infant grandsons, if any, as the court of common pleas, to which the case will be remanded, shall find, under all the circumstances of the case, to be strictly reasonable and just.

HEAD v. LORD TEYNHAM.

(In Chancery, before Lord Loughborough, Sir W. H. Ashhurst, J., and Sir Beaumont Hotham, B., Commissioners, 1783. 1 Cox, 57.)

Bill to carry the trusts of a will into execution, whereby, amongst other things, lands were limited to trustees for a term of 500 years to raise £4,000. for younger children's portions. There being six younger children entitled under this limitation to have the £4,000., two of them assigned their shares of the £4,000. to a trustee for the benefit of two other of the children. And the only question was, whether it was necessary that this trustee should be a party to this suit. For plaintiff it was insisted that as the original trustees of the term who had the legal estate, and all the children who had the beneficial interest were before the court, there was no occasion to make the other trustee a party, and the Court would direct a sale of the term without his joining in the sale; and of that opinion was the court—and decreed accordingly.

JOSSELYN v. JOSSELYN.

(In Chancery, before Sir Lancelot Shadwell, Vice Chancellor, 1837. 9 Simons, 63.)

James Josselyn, the testator in the cause, disposed of his residuary personal estate in the following words: "All the rest, residue and remainder of my goods, chattels, ready money, securities for monies in the public stocks or funds, debts and all other personal estate whatsoever, I give unto John Josselyn, the son of my late cousin John Josselyn, deceased; and I order and direct my executors or the survivor of them, etc., to place the same out on government or good real security, and the interest arising therefrom, as the same shall become due, to place out on the like securities, so as to accumulate, and the

principal to be paid to the said John Josselyn at his attainment of the age of twenty four years."

The plaintiff attained 21 in August, 1837, and, thereupon, presented a petition stating that he was advised that, on attaining that age, he became entitled, under the will, to a vested interest in the testator's residuary estate, and the accumulations thereof, and praying that the funds of which the residue and accumulations consisted, might be transferred to him.

THE VICE CHANCELLOR. The residue is actually given to the plaintiff; and the words which follow the gift are merely directory as to the future management of what is before given. I shall, therefore, make an order, according to the prayer of the petition.

GOSLING v. GOSLING.

(In Chancery, before Sir W. Page Wood, Vice Chancellor, 1859. Johnson, 265.)

Bennett Gosling devised real estate to trustees to hold to the use of plaintiff for life, remainder to the use of his first and other sons respectively in tail male, with divers remainders over. By a codicil he provided: "It is my particular desire, that no one shall be put in possession of my estate, or shall enjoy the rent, dividends, and profits of any part thereof, or of any property left by my will or codicil, until he shall attain the age of twenty-five years; and in the meantime, the rent, dividends, and profits to accumulate."

The questions for the opinion of the court were: Whether the testator's desire expressed in the codicil with respect to the accumulations of the rent, dividends, and profits of his estate and property, was operative; and whether such rent, dividends, and profits, or any of them, ought to be accumulated in accordance therewith.

THE VICE CHANCELLOR.⁵ The principle of this court has always been to recognize the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any direction by the testator to the effect that they are not to enjoy until a later age; unless, during the interval, the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full so soon as they attain twenty-one. And upon that principle, unless there is in the will, or in some codicil to it, a clear indication of an intention on the part of the testator, not only that his devisees are not to have the enjoyment of the property he has devised to them until they attain twenty-five, but that some other person is to have that enjoyment—or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five as to induce the court to hold, that,

⁵ The statement is abridged and part of the opinion is omitted.

as to the previous rents and profits, there has been an intestacy—the court does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full until they attain the age of twenty-five years. * * *

The true construction of the codicil is clearly this: There is to be no alteration in the limitations made by the will as regards the persons who are to take, or as regards the time at which their interests are to be vested. But having said by his will that they should enjoy the property at twenty one, it occurs to him in the codicil, that a young man of twenty one is not competent to manage his affairs and, therefore, he desires “that no one shall be put in possession of his estate, or shall enjoy the rents,” until he shall attain twenty-five; every word in the codicil pointing to the enjoyment and user of a gift which is taken under the will, and nothing pointing to a revocation of that gift for any purpose, still less for the purpose of creating an intestacy.

It seems to me clear, both upon principle and upon the authorities which were cited, that the clause in the codicil was simply an attempt to put a fetter upon the enjoyment of the property given by the will after the period when the law says the owner of property shall enjoy it. * * *

The answer to the second question will be, that the desire of the testator, expressed in the codicil with respect to the accumulations of the rent, dividends, and profits of his estate and property, is inoperative.⁶

Decree accordingly.

⁶ *Saunders v. Vautier*, 4 Beav. 115 (1841); *Curtis v. Lukin*, 5 Beav. 147 (1842) 155, 156; *Jackson v. Majoribanks*, 12 Sim. 93 (1841); *Jacob's Will*, 29 Beav. 402 (1861); *Tatham v. Vernon*, 29 Beav. 604 (1861); *Coventry v. Coventry*, 2 Dr. & Sm. 470 (1865); *Magrath v. Morehead*, L. R. 12 Eq. 491 (1871); *Hilton v. Hilton*, L. R. 14 Eq. 468 (1872); *In re Cammeron*, L. R. 26 Ch. Div. 19 (1884); *In re Tweedie*, L. R. 27 Ch. Div. 315 (1884); *Harbin v. Masterman*, L. R. 2 Ch. 184 (1894); *In re Johnston*, L. R. 3 Ch. 204 (1894); *Miller's Trustees v. Miller* (Court of Session) 18 R. 301 (1890); *Cuthbert and Another*, 31 Sc. L. R. 575 (1894); *Jasper v. Maxwell*, 16 N. C. 357 (1830); *Huber v. Donoghue*, 49 N. J. Eq. 125, 23 Atl. 495 (1891).

Where property is held in trust for the children of a woman, and in default of children in trust for another, the latter may compel a conveyance by the trustee, as soon as the woman in the opinion of the court has become incapable of bearing children. *Miles v. Knight*, 12 Jur. 666 (1848); *Forty v. Reay*, Dart. V. & P. (5th Ed.) 345 (1853); *Groves v. Groves*, 12 W. R. 45 (1863); *Dodd v. Wake*, 5 De G. & Sm. 226 (1852); *Edwards v. Tuck*, 23 Beav. 268 (1856); *In re Widow's Trusts*, L. R. 11 Eq. 408 (1871); *In re Miller's Estate*, L. R. 14 Eq. 245 (1872); *Browne v. Taylor*, W. N. 190 (1872); *Maden v. Taylor*, 45 L. J. Ch. 569 (1876); *Archer v. Dowsing*, W. N. 43 (1879); *Taylor's Trusts*, 29 W. R. 350 (1881); *Croxtan v. May*, L. R. 9 Ch. Div. 388 (1878); *Davidson v. Kimpton*, L. R. 18 Ch. Div. 213 (1881); *Browne v. Warneck*, L. R. 7 Ir. Ch. 3 (1880); *Washington v. Bank for Savings*, 65 App. Div. 338, 72 N. Y. Supp. 752 (1901); *Gowen's Appeal*, 106 Pa. 288 (1884); *Estate of Mellon*, 16 Phila. (Pa.) 323 (1884).

See, however, *Towle v. Delano*, 144 Mass. 95, 10 N. E. 769 (1887); *List v. Rodney*, 83 Pa. 483 (1877); *Westhafer v. Koons*, 144 Pa. 26, 22 Atl. 885 (1891).

CLAFLIN v. CLAFLIN et al.

(Supreme Judicial Court of Massachusetts, 1889. 149 Mass. 19, 20 N. E. 454, 3 L. R. A. 370, 14 Am. St. Rep. 393.)

Appeal from supreme judicial court, Suffolk county; William Allen, Judge.

Bill by Adelbert E. Claflin against William Claflin and others, trustees under the will of Wilbur F. Claflin, deceased, to require them to pay the complainant a legacy given by said will. From a decree dismissing the bill complainant appeals.

FIELD, J. By the eleventh article of his will, as modified by a codicil, Wilbur F. Claflin gave all the residue of his personal estate to trustees, "to sell and dispose of the same, and to pay to my wife, Mary A. Claflin, one-third part of the proceeds thereof, and to pay to my son Clarence A. Claflin, one-third part of the proceeds thereof, and to pay the remaining one-third part thereof to my son Adelbert E. Claflin, in the manner following, viz: Ten thousand dollars when he is of the age of twenty-one years, ten thousand dollars when he is of the age of twenty-five years, and the balance when he is of the age of thirty years."

Apparently, Adelbert E. Claflin was not quite 21 years old when his father died, but he some time ago reached that age, and received \$10,000 from the trust. He has not yet reached the age of 25 years, and he brings this bill to compel the trustees to pay to him the remainder of the trust fund. His contention is, in effect, that the provisions of the will postponing the payment of the money beyond the time when he is 21 years old are void. There is no doubt that his interest in the trust fund is vested and absolute, and that no other person has any interest in it; and the authority is undisputed that the provisions postponing payment to him until some time after he reaches the age of 21 years would be treated as void by those courts which hold that restrictions against the alienation of absolute interests in the income of trust property are void. There has indeed, been no decision of this question in England by the House of Lords, and but one by a Lord Chancellor; but there are several decisions to this effect by Masters of the Rolls, and by Vice-Chancellors. The cases are collected in Gray, Rest. Alien. §§ 106-112, and appendix II. See *Josselyn v. Josselyn*, 9 Sim. 63; *Saunders v. Vautier*, 4 Beav. 115, on appeal, Craig. & P. 240; *Rocke v. Rocke*, 9 Beav. 66; *In re Young's Settlement*, 18 Beav. 199; *In re Jacob's Will*, 29 Beav. 402; *Gosling v. Gosling*, H. V. R. Johns. 265; *Turnage v. Greene*, 55 N. C. 63, 62 Am. Dec. 208; *Battle v. Petway*, 27 N. C. 576, 44 Am. Dec. 59.

These decisions do not proceed on the ground that it was the intention of the testator that the property should be conveyed to the beneficiary on his reaching the age of 21 years, because in each case it was clear that such was not his intention, but on the ground that

the direction to withhold the possession of the property from the beneficiary after he reached his majority was inconsistent with the absolute rights of property given him by the will.

This court has ordered trust property conveyed by the trustee to the beneficiary when there was a dry trust, or when the purposes of the trust had been accomplished, or when no good reason was shown why the trust should continue, and all the persons interested in it were *sui juris*, and desired that it be terminated; but we have found no expression of any opinion in our reports that provisions requiring a trustee to hold and manage the trust property until the beneficiary reached an age beyond that of 21 years are necessarily void if the interest of the beneficiary is vested and absolute. See *Smith v. Harrington*, 4 Allen (Mass.) 566; *Bowditch v. Andrew*, 8 Allen (Mass.) 339; *Russell v. Grinnell*, 105 Mass. 425; *Inches v. Hill*, 106 Mass. 575; *Sears v. Choate*, 146 Mass. 395, 15 N. E. 786, 4 Am. St. Rep. 320. This is not a dry trust, and the purposes of the trust have not been accomplished, if the intention of the testator is to be carried out.

In *Sears v. Choate* it is said: "Where property is given to certain persons for their benefit, and in such a manner that no other person has or can have any interest in it, they are in effect the absolute owners of it; and it is reasonable and just that they should have the control and disposal of it, unless some good cause appears to the contrary." In that case the plaintiff was the absolute owner of the whole property, subject to an annuity of \$10,000, payable to himself. The whole of the principal of the trust fund, and all of the income not expressly made payable to the plaintiff, had become vested in him when he reached the age of 21 years by way of resulting trust as property undisposed of by the will. Apparently the testator had not contemplated such a result, and had made no provision for it, and the court saw no reason why the trust should not be terminated, and the property conveyed to the plaintiff.

In *Inches v. Hill*, *supra*, the same person had become owner of the equitable life-estate and of the equitable remainder, and, "no reason appearing to the contrary," the court decreed a conveyance by the trustees to the owner. See *Whall v. Converse*, 146 Mass. 345, 15 N. E. 660.

In the case at bar nothing has happened which the testator did not anticipate, and for which he has not made provision. It is plainly his will that neither the income nor any part of the principal should now be paid to the plaintiff. It is true that the plaintiff's interest is alienable by him, and can be taken by his creditors to pay his debts, but it does not follow because the testator has not imposed all possible restrictions that the restrictions which he has imposed should not be carried into effect.

The decision in *Broadway Nat. Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504, rests upon the doctrine that a testator has a right to dispose of his own property with such restrictions and limitations, not

repugnant to law, as he sees fit, and that his intentions ought to be carried out, unless they contravene some positive rule of law, or are against public policy. The rule contended for by the plaintiff in that case was founded upon the same considerations as that contended for by the plaintiff in this, and the grounds on which this court declined to follow the English rule in that case are applicable to this; and for the reasons there given we are unable to see that the directions of the testator to the trustees to pay the money to the plaintiff when he reached the ages of 25 and 30 years are against public policy, or are so far inconsistent with the rights of property given to the plaintiff, that they should not be carried into effect. It cannot be said that these restrictions upon the plaintiff's possession and control of the property are altogether useless, for there is not the same danger that he will spend the property while it is in the hands of the trustees as there would be if it were in his own.

In *Sanford v. Lackland*, 2 Dill. 6, Fed. Cas. No. 12,312, a beneficiary who would have been entitled to a conveyance of trust property at the age of 26 became a bankrupt at the age of 24, and it was held that the trustees should convey his interest immediately to his assignee, as "the strict execution of the trusts of the will had been thus rendered impossible." But whether a creditor or a grantee of the plaintiff in this case would be entitled to the immediate possession of the property, or would only take the plaintiff's title *sub modo*, need not be decided. The existing situation is one which the testator manifestly had in mind, and made provision for. The strict execution of the trust has not become impossible; the restriction upon the plaintiff's possession and control is, we think, one that the testator had a right to make; other provisions for the plaintiff are contained in the will, apparently sufficient for his support; and we see no good reason why the intention of the testator should not be carried out. *Russell v. Grinnell*, *ubi supra*; *Toner v. Collins*, 67 Iowa, 369, 25 N. W. 287, 56 Am. Rep. 346; *Rhoads v. Rhoads*, 43 Ill. 239; *Lent v. Howard*, 89 N. Y. 169; *Barkley v. Dosser*, 15 Lea (Tenn.) 529; *Carmichael v. Thompson* (Pa.) 6 Atl. 717; *Lampert v. Haydel*, 20 Mo. App. 616.

Decree affirmed.

FORD v. BATLEY.

(In Chancery, before Sir John Romilly, Master of the Rolls, 1853.
17 Beavan, 303.)

The testator directed his executors, immediately after his decease, to purchase, in their names, from the Commissioners for the Reduction of the National Debt, by the Act 10 Geo. IV, c. 24, empowered to grant annuities, or of or from any public company, duly empowered by act of Parliament, charter, or otherwise, to grant annuities, an annuity of £30. for the plaintiff.

The executors handed over the residue to the residuary legatee, without making the investment, there being some doubt as to the identity of the annuitant.

The plaintiff, however, ultimately established his right to the annuity.

Mr. Craig and Mr. Southgate, for the plaintiff. First, the annuitant has a right to select the security upon which the annuity shall be purchased; and, secondly, he has a right to elect to take the purchase-money instead of having the annuity purchased. He elects to have a government annuity, and insists on having the money necessary to purchase it.

Mr. Goodeve, contra. The testator has given his executors a discretion as to the mode of purchasing the annuity. This should be exercised in a manner the least prejudicial to the estate, and the annuity should therefore be purchased from a public company, whose terms are less onerous than those of government. Secondly, the testator has directed the annuity to be purchased in the names of the executors. His directions they are bound to follow, and to allow the plaintiff to take the money would be opposed to the clear intention of the testator, who intended to give an annuity and not a legacy. He referred to *Blewitt v. Roberts* [Craig & Ph. 274].

THE MASTER OF THE ROLLS. The annuitant is entitled to have the best security for his annuity, which is a government security. I am, therefore, of opinion, that he is entitled to a government annuity.

I also think he is entitled to have such a sum of money as would be required to purchase an annuity from the Commissioners for the Reduction of the National Debt, for it is obvious, that if an annuity were purchased, he might sell it immediately afterwards.⁷

⁷ *Re Browne's Will*, 27 Beavan, 324 (1859); *Stokes v. Cheek*, 28 Beav. 620 (1860); *Gott v. Nairne*, L. R. 3 Ch. Div. 278 (1876); *Biggs v. Peacock*, L. R. 22 Ch. Div. 284 (1882); *In re Mabbett*, L. R. (1891) 1 Ch. 707; *Fluke v. Executors of Fluke*, 16 N. J. Eq. 478 (1864); *Morse v. Hackensack Savings Bank*, 47 N. J. Eq. 279, 20 Atl. 961, 12 L. R. A. 62 (1890); *Huber v. Donoghue*, 49 N. J. Eq. 125, 23 Atl. 495 (1891); *Prentice v. Janssen*, 79 N. Y. 478 (1880); *Armstrong v. McKelvey*, 104 N. Y. 179, 10 N. E. 266 (1887); *Greenland v. Waddell*, 116 N. Y. 234, 22 N. E. 367, 15 Am. St. Rep. 400 (1889); *Mellen v. Mellen*, 139 N. Y. 210, 34 N. E. 925 (1893); *McDonald v. O'Hara*, 144 N. Y. 566, 39 N. E. 642 (1895).

See, also, *Pearson v. Lane*, 17 Ves. Jr. 101 (1809); *Hetzel v. Barber*, 69 N. Y. 1 (1877).

In *Stokes v. Cheek*, 28 Beav. 620 (1860), the testatrix, after bequeathing several annuities and authorizing her trustees to sell her freeholds, etc., and directing them out of the produce to purchase government annuities, provided "that no one of the annuitants hereinbefore named, shall be, nor shall the executors or administrators of any of them be, allowed to accept the value of the annuity to which he or she, respectively, shall be entitled, in lieu thereof."

The estate having been sold, the question arose whether the annuitants were entitled to receive the amount necessary to purchase the annuities, instead of having the annuities purchased for them. The Master of the Rolls, Sir John Romilly, answered the question in the affirmative. To the same effect, see *Hatton v. May*, L. R. 3 Ch. Div. 148 (1870); *Roper v. Roper*, L. R. 3 Ch. Div. 714 (1876); *In re Mabbett*, L. R. (1891) 1 Ch. 707.

HATTON v. MAY.

(In Chancery, before Vice Chancellor Malins, 1876. Law Reports, 3 Chancery Division, 148.)

Thomas Macauley, by his will, dated the 26th of July, 1872, gave all the residue and remainder of his property, estate, and effects, to George Hatton and Sidney Smith, their executors, administrators, and assigns, upon trust to convert the same into money, and to purchase thereout from Government an annuity of £100. sterling for Mary Ann May during her life, and which he gave to her accordingly; and after directing three other annuities to be purchased in the like manner for each of his three daughters, he declared that the said Mary Ann May and his three daughters should not, nor should either of them, nor should their personal representatives respectively, in case of the death of either of them before such purchase, be entitled to elect to receive the price or value of the said annuity in lieu of it; and he declared that all and every the annuities given by his will to Mary Ann May and his said daughters were so given for their sole and separate benefit and disposal as the same should be from time to time payable independently and exclusively of, and so as not to be subject to the control, debts, or engagements of any husband, and to be paid to the respective proper hands of the said Mary Ann May and his said daughters respectively, and their respective receipts given when and as the same respectively became due and payable, to be alone and only proper discharges for the same; and he expressly declared that if any of the said annuitants should at any time sell, alien, assign, transfer, incumber, or in any wise dispose of or anticipate the said respective annuities, or any part thereof, then and in such cases respectively, and immediately thereupon, the same annuity to such annuitant should cease, determine, and be void, and should sink into and become part of the residue of his personal estate and effects. And upon further trust that his said trustees should pay all the residue of his trust moneys, after making such purchases and deductions as aforesaid, and all other (if any) his personal estate, property, and effects, unto the conductor of an orphan asylum therein named, to be applied for the use of such asylum.

By a codicil to his will, dated the 26th of July, 1872, the testator appointed Mary Ann May and Sarah Morgan to be trustees and executors of his will jointly with G. Hatton and S. Smith. He died shortly afterwards, and left a considerable amount of property beyond what was specifically bequeathed by his will. All the annuitants were alive. The bill was filed by G. Hatton, S. Smith, and Sarah Morgan, against Mary Ann May for the administration of his estate, and for a declaration as to the rights of Mary Ann May in respect of her annuity.

The defendant, Mary Ann May, had required her co-executors, the plaintiffs, to pay her such a sum as would be required to purchase a

Government annuity of £100. for her life, but the plaintiffs were advised that it was doubtful whether she was entitled to this payment.

MALINS, V. C. The cardinal rule in construing wills is to look at the whole of a will, in order to ascertain the intention of the testator. If the direction to the trustees to purchase an annuity for Mary Ann May had stood alone, it would, according to the authorities, have entitled her to be paid the price for which a Government annuity could be purchased; but to ascertain whether that is the effect of the bequest, you must look at the whole of the will, and if you see that such is not the intention of the testator, but that there is an event specified upon the happening of which the annuity is to be cut short, then you must pay the amount to the annuitant so long only as her title to it endures. By the first clause the annuitant gets so much money as will buy the annuity, but the testator subsequently shows his anxiety that this annual sum shall be a personal benefit for her. He says that Mary Ann May, and each of his three daughters, "shall not, nor shall either of them, be entitled to elect to receive the price or value of the annuity in lieu of it;" but notwithstanding that, it has been argued that the annuitant is entitled to have a sum of money in lieu of the annuity. Then he goes on to direct that all the annuities given by his will "are so given for their sole and separate benefit and disposal, as the same shall be from time to time payable, independently and exclusively of and so as not to be subject to the control, debts, or engagements of any husband she may marry." If he had stopped there it would have been like the case of *Woodmeston v. Walker* [2 Russ. & My. 197]. It would have been a gift to the separate use of each annuitant, and Mary Ann May might simply have elected to take the money; but then, in order to carry his intention into effect more fully, he declares "that if any of the said annuitants shall at any time sell, alien, assign, transfer, incur, or in any wise dispose of or anticipate the said respective annuities, or any part thereof, then and in such cases respectively, and immediately thereupon, the same annuity to such annuitant shall cease, determine, and be void, and shall sink into and become part of the residue of my personal estate and effects." Now, therefore, he has commenced by giving an absolute annuity, but he has declared she shall not take it if she aliens, assigns, transfers, incumbers, or in any wise disposes of it, and if she does then it is to be void and to sink into the residue.

This is clearly settled, that if you give an annuity till the happening of any specified event, that is the measure of its limitation. It may be cut short by a conditional limitation which abridges the estate. That is distinctly laid down in *Fearne* [page 10, note "h"], where the difference is stated between a contingent remainder and a conditional limitation so that the gift is to her for life, and if she does certain acts, then the interest is to be cut short. That is a conditional limitation, that in case she alienates the annuity it is to be void and to go over. What sort of law is it, then, which says that

a testator has no power to prevent an annuitant from having a power of alienation? The case of *Shee v. Hale* [13 Ves. 404], which is not by any means the first case laying down the rule, was a bequest of an annuity with a condition that it should fall into the residue upon alienation or insolvency, and the condition was held to be broken in taking the benefit of the Insolvent Act, and the annuity was forfeited.

That rule having been solemnly settled, I have always relied upon it as one of the fixed principles of the law, and I have never known it questioned.

Now, this case is not a new one. The point was argued in *Day v. Day* [1 Drew. 569]. I need not say that I entertain the highest respect for the decisions of my learned predecessor, but that case was produced in argument in the case of *Power v. Hayne* [Law Rep. 8 Eq. 262], and having carefully looked into the case and fully considered the judgment, and delayed giving my decision, I deliberately came to the conclusion that I could not follow it, because I thought that if the trustees had paid over the value of the annuity to Charles Day, and he had afterwards become bankrupt, they could have no answer whatever to the persons entitled under the gift over. The views I then expressed are to my mind conclusive. That case decides that you can give an annuity with a provision for its going over in case of alienation.

The will says there is an annuity to be purchased, which is to be paid to Mary Ann May for her separate use, and if she commits any act of alienation it is to fall into the residue. What is the difficulty of carrying that direction into effect? My attention was drawn to the case of *Woodmeston v. Walker*, by Mr. Cutler, in which the very same question arose. It is a case I well remember, for I heard all the arguments in it, and they made considerable impression upon me at the time. The case was this: a testator directed that one-third of his residuary estate, should be invested in the purchase of an annuity for the life of his sister, who was unmarried, and this annuity he gave to her separate use and independently of any husband she might marry, and without power to sell or assign the same by anticipation. The Master of the Rolls, Sir J. Leach, refused to order payment to the legatee of the price which would be paid for the annuity, on the ground that the restraint against alienation would be valid in case of future coverture. That decision was reversed by Lord Brougham, who said [2 Russ. & My. 204]: "If a testator be desirous to give an annuity without the power of anticipation, he can only do so by declaring that the act of alienation shall determine the interest of the legatee and create a new interest in another. There is no gift over in the present case, which is that of a mere naked prohibition, not guarded by any clause of forfeiture." He also previously says: "Where the subject is a personal chattel, it is impossible so to tie up the use and enjoyment of it as to create in the donee a

life estate which he may not alien. Although the object may be obtained indirectly, in a manner consistent with the known rules of law, by annexing to the gift a forfeiture or defeasance on the happening of a particular event, or on a particular act being done, * * * and upon the happening of the event or the doing of the act a new and distinct estate accrues to a different individual." That is exactly what this testator has done. The annuitant is not to have the right to take money instead of the annuity, and it is to be inalienable. Nothing can be better expressed or more consonant with every rule of law. The cases cited by Mr. Pearson, such as *Barnes v. Rowley* [3 Ves. 305], and *Bayley v. Bishop* [9 Ves. 6], where property was given absolutely, have nothing to do with this question. Such was the case of *Bradley v. Peixoto* [3 Ves. 324]. There the words were: "I give to my son the dividends arising from £1620. bank stock for his support during his life, but at his decease the bank stock to devolve to his heirs, executors, administrators and assigns;" and he went on to say that if his son attempted to dispose of the principal such attempt should exclude him from any benefit in his will, and he should forfeit the whole of his share, principal and interest, which should be divided among his other children. The son filed a bill that he might be declared entitled to the bank stock absolutely. The Master of the Rolls said it was laid down as a rule long established, that where there is a gift, with a condition inconsistent with and repugnant to such gift, the condition was wholly void. He considered that the condition in that case was inconsistent with the interest given to the legatee in the stock, and was therefore void. No wonder that was held to be void; if this were a gift to Mary Ann May absolutely I should say the same.

I think the whole case was decided by me in *Power v. Hayne* [Law Rep. 8 Eq. 262], in a manner I am still satisfied with. I decided that case after much consideration. The arguments were heard on the 7th of May, and I took till the 28th before I delivered my judgment, and during that time, as my habit is, I looked into all the cases cited. My decision, therefore, was the result of careful investigation of the authorities, and I desire to be understood as adhering to that decision, and repeating the rule of law I there laid down, that in the case of a gift to a tenant for life, either to A. until a certain event should happen or for a whole life, with a proviso that it shall cease on the happening of a particular event, the restriction is clearly effectual.

If there could have been any doubt in this case it is removed by *Allen v. Jackson* [1 Ch. Div. 399]. That is, to my mind, completely in accordance with the rules I have laid down. There a testatrix gave the income of certain property to her niece and her niece's husband during their joint lives, and to the survivor during his or her life, with a proviso that if the husband survived his wife and married again the property should go over. The husband survived his wife and married again. It was there held that this was a limitation

to the husband while remaining a widower, that the proviso was valid, and upon the husband marrying again the gift over took effect.

I should take the present case to be a conditional limitation cutting short the first gift. Mary Ann May is not to take the annuity in money and is not to alienate. Mr. Pearson's construction would entitle her to take the whole, so that she might spend the money the day after receiving it, leaving nothing for her support during the remainder of her life.

My opinion is that she is entitled to the annuity only for her life, or until alienation.

The decree will be that an annuity is to be purchased for Mary Ann May in the name of the trustees, and to be paid to her for life or until she shall alien, assign, transfer, incumber, or in any wise dispose of or anticipate the annuity, or any part thereof.⁸

HAYES v. OATLEY.

(In Chancery, before Sir John Romilly, Master of the Rolls, 1872. *Law Reports*, 14 Eq. 1.)

By virtue of two indentures, dated the 11th of December, 1838, a mortgage debt of £12,000. became vested in William Jones and William Henry Oatley upon trust as to £2,000., part thereof, for Walter Stubbs absolutely, and as to £10,000., the residue thereof, upon trust to pay the interest thereof to Elizabeth Stubbs, the wife of Walter Stubbs, during his life, and after her death, to Walter Stubbs during his life, and, subject as aforesaid, upon trust for such persons as Elizabeth Stubbs should by deed or will appoint, and in default of appointment for Walter Stubbs, his executors, administrators, and assigns.

Elizabeth Stubbs by her will, dated the 23d of June, 1838, expressed her wish that her husband should enjoy her income during his life, after paying two annuities of £150. and £50. as therein mentioned; and at his decease she gave pecuniary legacies, amounting in the whole to more than £5,000., out of the fund of £10,000. She made a codicil to her will, dated the 7th of October, 1844, in the following terms: "To prevent any doubt on the construction of my will, I hereby declare that the legacies given by my said will are to be payable and are to be paid only out of the sum of £5,000. (so far as the said sum of £5,000. may extend), one moiety or half part of the sum of £10,000., over which I have an appointing power under my settlement (subject to the interest for life of my said husband); and as to the remaining full moiety of the said sum of £10,000., I hereby appoint, give, and bequeath the same remaining moiety, being £5,000.,

⁸ *Power v. Hayne*, L. R. 8 Eq. 262 (1869); *In re Draper*, 57 L. J. Ch. (N. S.) 942 (1888). *Contra*, *Day v. Day*, 1 Drew. 569 (1853).

to my said dear husband, Walter Stubbs; all my estate whatsoever and wheresoever and all the residue of my personal estate, I give, devise, and bequeath to my said husband, Walter Stubbs, his heirs, executors and administrators; I appoint the said Walter Stubbs to be executor of my will and codicil; and I confirm my said will in all respects save as it may be repugnant to this codicil; and I revoke the will so far as it is repugnant or inconsistent with this codicil."

Elizabeth Stubbs died on the 12th of October, 1844, and Walter Stubbs proved her will. After her death the mortgage debt of £12,000. was paid off by the persons entitled to the equity of redemption in the property subject thereto. A receipt for the debt was given by William Jones and William Henry Oatley, but the money was actually received by Walter Stubbs, who retained thereout the sums of £2,000. and £5,000. to which he was entitled, and invested £3,000., part of the remaining £5,000., to answer the legacies given by the will of his wife. The residue of the last mentioned £5,000., amounting to £2,000., was not invested by Walter Stubbs, and by reason of his insolvency was subsequently lost.

Walter Stubbs died in 1865, and William Jones in 1869.

In 1871 this suit was instituted by William Hayes and Mary, his wife (the latter of whom was a legatee under the will of Elizabeth Stubbs), against William Henry Oatley and the legal personal representative of William Jones, to compel them to make good the sum of £2,000. which had been lost.

LORD ROMILLY, M. R. I entertain no doubt that the trusts of the settlement were completely discharged when the trustees paid over the £10,000. to the executor of Mrs. Stubbs. If it were not so, the trustees would have to carry into effect all the limitations of her will. I think that it is a mistake to say that her will did not come into operation till the death of her husband.

The bill must be dismissed with costs.⁹

BUSK v. ALDAM.

(In Chancery, before Sir Richard Malins, Vice Chancellor, 1874. *Law Reports*, 19 Eq. 16.)

Demurrer. Thomas Benson Pease by will dated in 1839, after bequeathing to defendants £10,000. upon trust to invest and pay the income to his daughter, Susannah Pease, afterwards Susannah Busk,

⁹ *Re Philbrick's Settlement*, 34 L. J. Ch. 368 (1865); *Re Hoskin's Trusts*, L. R. 5 Ch. Div. 229 (1877), on appeal L. R. 6 Ch. Div. 281 (1877).

In 6 Ch. Div. 281, at page 283, James, L. J., said: "I may add that, if the merits had to be gone into, I should hold it to be established beyond all question that where a feme covert, or any other person having a general power of appointment over a fund of personalty, makes an appointment of the fund by will and appoints an executor, the executor, when he has proved the will, is entitled to receive the appointed fund."

for life, with power to her to appoint the fund to her children "in such manner" as she should direct, died May 24, 1840. Mrs. Busk died in 1873. By will dated in 1868 she appointed that the fund of £10,000. should be held upon certain trusts in favor of her children and directed it to be paid to trustees named in her will and that they should either permit the same to remain in its actual state of investment, or should sell and invest in the manner therein mentioned, which gave a greater range of investments than allowed by the will of Thomas Benson Pease.

The trustees of Mrs. Busk's will filed a bill against the trustees of Thomas Benson Pease's will and prayed that defendants be ordered to pay the £10,000. to them. Defendants demurred.

Sir RICHARD MALINS, V. C., after stating the facts, continued:

So far as the appointment by Mrs. Busk to trustees is concerned, it has been held by a long series of decisions that it is a valid execution of the power of appointment, and that the appointment is just as good as if it had been made direct to the objects of the power. But this bill is filed for the purpose of having the fund transferred from the trustees in whose control it is now placed to those to whom it is appointed. For what object this is desired I cannot understand. It is said that it would be very convenient to have the fund placed in the hands of the new trustees. But I cannot look at that. I must consider what was intended to be done by the original testator; and I can see that such a transfer as is asked would violate his intention. I asked Mr. Cookson whether he contended that a mere appointment of new trustees by the donee of the power would have been valid, and he pressed upon me that, on the authority of the cases cited, the court was bound to hand over the fund to the new trustees.

Now there is, first of all, the case of *Thornton v. Bright* [2 My. & Cr. 230], which simply decides that an appointment to persons not an object of a power as trustee for a person who is an object is a valid exercise of the power; and there are also *Kenworthy v. Bate* [6 Ves. 793], *Trollope v. Linton* [1 S. & S. 477], *Cowx v. Foster* [1 J. & H. 30], and *Fowler v. Cohn* [21 Beav. 360]. But those were all cases where there was real estate to be converted and no person appointed to effect the conversion, and it was decided that in that case an appointment to trustees to sell and convert and distribute the proceeds amongst the objects of the power was a valid execution of the power. But I am unable to see how that can be an authority for taking away a fund from trustees who are fit and proper, and handing it over to others who may not be so fit, in a case where the duty of the trustees is simply to hold the fund.

I am asked to treat these cases as establishing a general law, that where, in all cases, a fund is settled upon trust for a mother for life, and then upon trust for her children as she should appoint, and she appoints to trustees for her children, the first trustees are bound to hand over the fund to the trustees appointed by the daughter. Here

nothing more is required than that some one should hold the fund, and it is suggested that I am bound to hand it over to the second trustees.

Mr. Cookson says that I decided the point in *Ferrier v. Jay* [L. R. 10 Eq. 550]. But what I there decided was, that where there was a general and a special power, and an appointment was made of both funds together to trustees in trust to pay debts and to apply the residue to the objects of the special power, the appointment must be read *reddendo singula singulis*, and the fund coming under the general power applied in the first instance to the purposes to which the fund subject to the special power was not applicable. I agreed with the decision in *Cowx v. Foster*, that the circumstance of directing debts to be paid only meant that they were to be paid out of the particular portion of the mixed fund which could be so applied.

I did also in that case undoubtedly say that the second trustees were the most fit persons to have charge of the fund; but I did not say that where it was a mere question which of two sets of trustees should hold a particular fund, the court would necessarily hand it over to the second set in point of date.

The demurrer will be allowed.¹⁰

ONSLow v. WALLIS.

(In Chancery, before Lord Chancellor Cottenham, 1849. 1 Hall & Twell, 513.)

By indentures of lease and release, dated in July, 1837, A. L. Sarel conveyed some freehold hereditaments to Wallis, in fee simple, upon trust to convey them to such persons and in all respects as Louisa Sarel, the wife of A. L. Sarel, should by deed appoint; and in default of appointment, upon trust to apply the rents to her separate use during her coverture; and after the decease of her husband, in case he died in her lifetime (an event which happened), then upon trust to convey the hereditaments to the use of Louisa Sarel, her heirs and assigns; but if she should die in the lifetime of her husband, then the trustee was to stand seized of the hereditaments in trust for the executors and administrators of Mrs. Sarel, as part of her personal estate.

Wallis died in April, 1842, whereupon the hereditaments in question descended to his eldest son, the defendant in this suit.

Mrs. Sarel survived her husband, and died in September, 1847. The answer alleged, that she died without an heir. She made a will in June, 1847, by which she devised certain hereditaments to one of the plaintiffs in this suit, in fee, and then continued as follows: "I

¹⁰ *Von Brockdorff v. Malcolm*, L. R. 30 Ch. Div. 172 (1885); *In re Tyssen*, L. R. (1894) 1 Ch. 56 (1893). See *Scotney v. Lomer*, L. R. 31 Ch. Div. 380, 386 (1886).

give certain legacies, which I have mentioned and specified in a certain memorandum in writing, marked with the letter A, and signed by me, which I direct my trustees and executors, hereinafter named, to pay out of my personal estate. I give, devise and bequeath all other the messuages, lands, tenements, hereditaments and real estate, and all the personal estate and effects of or to which I shall at my death be seized, possessed, or entitled at law or in equity, unto [the plaintiffs] their heirs, executors, administrators and assigns respectively, on trust that they and the survivor of them, and the heirs, executors, administrators or assigns of such survivor, do and shall, with all convenient speed, make sale and absolutely dispose of and convert into money, and call in and receive all the same real and personal estate respectively, and do and shall stand possessed of and interested in the moneys to arise from the sale thereof, in trust, in the first place, to pay thereout all costs, charges, and expenses of and attending the execution of the trusts of this my will, and my debts, funeral and testamentary expenses and legacies; and then in payment of the legacies given by me in a certain memorandum, signed by me, and marked with the letter 'A.' ”

The memorandum marked with the letter “A” had not been discovered.

It was alleged by the bill, and admitted by the answer, that there were debts of the testatrix, which her personal estate was not sufficient to pay. The trustees under the will applied to the defendant to convey the hereditaments to them as such trustees, but he insisted that he was entitled to hold them for his own benefit, subject to the payment of such portion of the charges created by the will, as were properly chargeable thereon, and which he offered to pay.

The bill prayed that the defendant might be decreed to convey and assure to them [the trustees under Mrs. Sarel's will], as such devisees aforesaid, the hereditaments comprised in the deeds of July, 1837.

The cause was heard by the Vice Chancellor of England, on the 16th of January, 1849, when he ordered a conveyance to be executed by the defendant, according to the prayer of the bill.

The defendant now appealed from that decision.

THE LORD CHANCELLOR. No case similar to this has been cited, where the owner of property which was on trust, has given it to somebody else; and whether it was so given beneficially, or not, is a question which the defendant has no right to inquire into. It is not like the case of *Burgess v. Wheate* [1 Eden, 177, 1 W. Bl. 123]. The only reason why the trustee, under such circumstances as existed in that case, is allowed to hold property, is because there is nobody to take it from him; it does not belong to any person whom the law recognizes as having a right to ask for the execution of the trust. Now here the original owner undoubtedly had a right, as against the trustee, to direct what he should do with the property; he was a

mere naked trustee. The testatrix in this case had a right to do what she pleased with the beneficial interest, and she did by her will direct the legal estate to be conveyed, or at least gave the property, to the trustees of her will. The question is, whether the defendant, who appears to be the trustee of the legal estate, has any right to inquire for what purpose these parties are to hold the trust property. It is a gift, in trust, it is true; but it is the appointment of persons who are to stand in the place of the original owner, as against the trustee. Then why is the beneficial interest, which is by the operation of the rule of law, in *Burgess v. Wheate*, to enure to the benefit of trustees, to enure to the benefit of this trustee? There is no want of persons authorized, as against him, to require a transfer of the beneficial interest. Suppose the testatrix had simply directed that the estate should be transferred, and had appointed new trustees, and directed the existing trustee to convey to those who are trustees under the will, could the trustee of the legal estate dispute the title of the trustees under the will, because they might or might not have the means of carrying into effect the trusts of the will?

The real question is, whether it is regulated by the doctrine in *Burgess v. Wheate*. I think that it is not regulated by the doctrine in *Burgess v. Wheate* at all, because that case proceeds on the fact of there being no persons having a right to control the legal estate, and here there are persons authorized to control the legal estate.

I do not take exactly the view which the Vice Chancellor seems to have done, because he seems to have considered that the matter would depend on the presumed intention of the testatrix. For that purpose, you are to assume she intended that the paper A should not be produced, and therefore there would be a failure of her declared intention. Therefore, if there is any trustee who is to have the benefit of the doctrine in *Burgess v. Wheate*, the trustees under the will are to have it. It cannot be considered that the testatrix had any such view at all. It must be presumed, she intended that the purposes declared by her will should be carried into effect. Those purposes have failed, in consequence of that paper A not being produced; it may be produced hereafter, or it may not. I do not proceed on that ground, but I proceed on this: That there are persons appointed by the owner of the property, to whom the property is to be conveyed. They are the only parties having a right to it; whether or not they have power afterwards to dispose of all the beneficial interest, is a matter to which the defendant Wallis, as mere owner of the legal estate, has nothing whatever to do.

This seems to me to be a case which does not fall within the doctrine of *Burgess v. Wheate*, so far as the defendant Wallis is concerned; and therefore the direction of the Vice Chancellor for a conveyance, under the terms of the will, is, I think, a proper decree, and it must be affirmed, with costs.¹¹

¹¹ S. C. 1 Mac. & G. 506.

In re LASHMAR.
MOODY v. PENFOLD.

(In the Supreme Court of Judicature, Chancery Division, 1890. *Law Reports*
[1891] 1 Ch. 258.)

Appeal from Mr. Justice Kekewich.

Peter Lashmar, by his will dated in 1858, devised a freehold house to three trustees in trust for Thomas Lashmar and Jane, his wife, for their lives and then for his nephew, John Lashmar, for life, and on his death unto Charles Lashmar, nephew of John Lashmar, absolutely in fee simple. Peter Lashmar died in November, 1859. John Lashmar died in March, 1875. Thomas Lashmar died in April, 1881, and Jane in November, 1889. Charles Lashmar died in August, 1868, leaving a will by which he gave to John Lashmar and John Moody all his property upon trust to pay to his wife Ann Lashmar, the income during her life, and after her death, upon trust for his son George Hartnup. He appointed John Lashmar and John Moody his executors.

George Hartnup was illegitimate and died intestate and without issue in July, 1880. Ann Lashmar died in October, 1886.

Shortly after the death of Jane Lashmar in 1889, Moody, the surviving trustee of Charles Lashmar, applied to defendant William Penfold, the surviving trustee of Peter Lashmar, for a conveyance, and that being refused the plaintiff took out an originating summons to determine his right to such a conveyance.

This summons, after being adjourned into court, was heard March 27, 1890, by Mr. Justice Kekewich, who made a decree in favor of plaintiff. The defendant appealed.

LINDLEY, L. J.¹² In this case a controversy has arisen as to which of two trustees is to keep certain property which was not intended for either of them. Mr. Penfold is in the happy position of having got it, and the question is whether anybody is entitled to take it away from him, and, in particular, whether Mr. Moody is entitled to take it away from him. The learned Judge has decided this question in Mr. Moody's favor, and when the appeal was opened and for a considerable time afterwards I was disposed to think that that decision was right. But Mr. Hadley has convinced me, and further reflection has confirmed the conviction, that the decision is wrong, and that the person who is in possession must keep what he has got.

The question arises in this way. Under the will of Peter Lashmar, which was dated in 1858, Charles Lashmar was entitled to an equitable reversion in fee in certain property, the legal estate of which was vested in William Penfold, who was the surviving trustee of Peter Lashmar's will. Charles Lashmar made a will, which I will

¹² The concurring opinions of Bowen and Fry, L. JJ., are omitted, and a portion of the opinion of Lindley, L. J.

shortly read. [His Lordship then stated this will, and continued:] Now the question is, upon that will, what interest (if any) the surviving trustee, William Moody, takes in this property; and I cannot find, after spelling over the will with all the care I can, that he is, or rather was, anything more than a bare trustee for George Hartnup. It is quite obvious that, as soon as Mrs. Jane Lashmar, the surviving tenant for life, died and George Hartnup attained twenty-one, that Moody had no duty whatever to perform. He had a power of sale during the life of the tenant for life, and also during the minority of George Hartnup; but after the tenant for life was dead and Hartnup had attained twenty-one, he was simply a bare trustee, having no duty whatever to perform. * * *

Mr. Hadley has convinced me that upon the true construction of this will, Moody, the trustee under it, having no duty whatever to discharge, and having nothing on earth to do with the property, cannot take the house in question from Penfold, who has got it. It appears to me that the true way to regard this will is to look through Moody as nobody. So it comes to this. The property is in Penfold on trust for nobody at all. Therefore, he keeps it; and accordingly the appeal must be allowed.

LINDLEY, L. J. * * * I think, perhaps, I ought to say with respect to *Onslow v. Wallis* [1 Mac. & G. 506], on which I think Mr. Justice Kekewich decided this case, that there the trustee had duties to perform, and if this gentleman had any duties to perform our decision would have been the other way. It is because he has none that we decide as we have done.

SECTION 2.—TRUSTEE'S DUTY TO PUT CESTUI QUE TRUST IN POSSESSION OF THE TRUST ESTATE.

TIDD v. LISTER and Others.

(In Chancery, before Sir John Leach, Vice Chancellor, 1820. 5 Maddock, 429.)

THE VICE CHANCELLOR.¹³ The testator in this case, after giving to his wife and daughter the personal occupation of the house in which he resided, and the use of his furniture, has devised and bequeathed his whole real and personal property to certain trustees upon trust, in the first place to pay his funeral expenses and debts; then to keep the buildings upon his estate, consisting of freehold, copyhold and leasehold, insured against loss or damage by fire; next to pay the

¹³ Only the opinion of the court is given.

premiums of certain policies of assurance on the lives of his two sons, which are to form a provision for their widows and children; then to pay annuities of sixty guineas each to his two sons; and lastly, he has given the surplus income between his wife and daughter during their joint lives, and the whole surplus income to the survivor for life; and in case his two sons should survive his wife and daughter, then he gives to them his whole real and personal estate. Soon after the death of the testator, a bill was filed in this court for the execution of the trusts of his will; and in the progress of that suit, the debts and funeral expenses were paid out of the personal estate, and the residue of the personal estate was secured in the name of the Accountant General, and is of an amount sufficient to satisfy the two annuities of sixty guineas each, given to the sons, who do accordingly receive the same from the Accountant General. The premiums of the policies of assurance continue to be paid out of the rents and profits of the estates. The mother died in the year 1819, and the daughter, who is become entitled to the whole surplus income of the real and personal estate, has married. The mother, the two sons, and two other persons, were the trustees named in the will; one of these persons is dead; the other has but little interfered in the trusts of the will; one of the sons is abroad, and the management of the property has principally devolved upon the son, William Lister. The present bill is filed by the daughter and her husband, praying, a conveyance, surrender and assignment of the legal estate from the trustees; and that the plaintiffs may be let into possession, or that a receiver be appointed. The prayer for the conveyance, surrender and assignment was abandoned at the bar, but it was insisted that it is a matter of course in a court of equity, to divest a trustee of the management of the trust property, and to deliver the possession to the cestui que trust for life. And that the only difficulty here was, that the trustees are in the first place directed to pay certain premiums upon policies of assurance, which remained to be provided for out of the rents and profits of the estates; and that to remove this difficulty the daughter's husband was willing to invest in the cause a sum sufficient to answer the amount of those annual payments; and the case of *Blake v. Bunbury* [1 Ves. Jr. 194] was cited as an authority for this doctrine.

My first impressions were strongly against the existence of any such rule. It is perfectly plain from the continuing nature of this trust that the testator intended that the actual possession of the trust property should remain with the trustees; and it did appear to me a singular proposition, that if a testator who gives in the first instance a beneficial interest for life only, thinks fit to place the direction of the property in other hands, which is an obvious means of securing the provident management of that property for the advantage of those who are to take in succession, that it should be a principle in a court of equity to disappoint that intention, and to deliver over the

estate to the cestui que trust for life, unprotected against that bias which he must naturally have to prefer his own immediate interest to the fair rights of those who are to take in remainder. Independently of the purpose of management of the property, a testator may be considered in the case of a female cestui que trust for life, as having a further view to her personal protection in the case of her marriage.

The husband can only compel the trustee to account to him for the wife's income by the aid of a court of equity; and this court, in certain cases of misconduct by the husband, will not compel the trustee to account to the husband, but will secure the income for the benefit of the wife. It is manifest that this protection would, to some extent, be prejudiced, if the husband were put into the possession of the trust estate.

The case of *Blake v. Bunbury* is no authority for the proposition for which it was cited. It was not the case of a cestui que trust for life, but the case of a legal tenant for life, subject to a term for raising a charge. There was there no purpose but to raise the charge, and the legal tenant for life, securing the charge, had upon every principle a right to the possession. There may be cases in which it may be plain from the expressions in the will, that the testator did not intend that the property should remain under the personal management of the trustee. There may be cases in which it may be plain from the nature of the property, that the testator could not mean to exclude the cestui que trust for life, from the personal possession of the property, as in the case of a family residence.¹⁴ There may be very special cases in which this Court would deliver the possession of the property to the cestui que trust for life, although the testator's intention appeared to be that it should remain with the trustee, as where the personal occupation of the trust property was beneficial to the cestui que trust, there the court taking means to secure the due protection of the property for the benefit of those in remainder, would, in substance, be performing the trust according to the intention of the testator. The present case is not one of special circumstances. It is not the personal occupation, but the management of the property, that is sought by this bill.

The cestui que trust for life is a feme covert. Two of the trustees are the persons, who, if they survive the wife, will be entitled to this property. The testator has thought fit to place his property in their

¹⁴ *Baylies v. Baylies*, 1 Coll. 537 (1844); *Powys v. Blagrove*, Kay, 495 (1854), affirmed 4 De G., M. & G. 448 (1854); *Roper v. Roper*, 29 Ala. 247 (1856); *Williamson v. Wilkins*, 14 Ga. 416, 422 (1854); *Wade v. Powell*, 20 Ga. 645 (1856); *Mountjoy v. Lashbrook*, 8 Dana (Ky.) 33 (1839); *Campbell v. Prestons*, 22 Grat. (Va.) 396 (1872).

See, also, *Kaye v. Powel*, 1 Ves. Jr. 408 (1791); *Jenkins v. Milford*, 1 J. & W. 629 (1820); *Clarke v. Earl of Ormonde*, Jacob, 108 (1821); *Denton v. Denton*, 7 Beav. 388 (1844); *Horne v. Wheelwright*, 2 Jur. (N. S.) 367 (1856); *Hoskins v. Campbell*, W. N. 59 (1869); *Etchells v. Williamson*, W. N. 61 (1869); *Young v. Miles' Ex'rs*, 10 B. Mon. (Ky.) 287 (1850).

hands, and out of the management of the *cestui que trust* for life, and I have no authority to revoke his will.

There is, however, in this bill, a prayer for a receiver, and allegations of misconduct to support that prayer. These allegations are denied by the answer, and not proved. But I find in the answer, that the accounting trustee, William Lister, expresses himself to be willing that a receiver should be appointed. If the plaintiffs desire a receiver, they are entitled to it, upon this consent of the trustee.¹⁵

TAYLOR v. TAYLOR.

(In Chancery, before Sir George Jessel, Master of the Rolls, 1875. *Law Reports*, 20 Eq. 297.)

James M. Taylor died in April, 1870. By his will he made certain devises and bequests to two trustees for the benefit of his wife during her life. She had entered into contracts for granting leases of portions of the real estate comprised in the trust. [An application was now made in the suit of *Taylor v. Taylor* that the contracts might be approved by the Court, and leases granted in pursuance thereof.]

Mr. Ince, for the trustees:

Secondly, the application is wrong in point of substance. Mrs. Taylor has no power to grant leases under the will, nor is she a person "entitled to the possession or to the receipt of the rents and profits" within the meaning of the *Leases and Sales of Settled Estates Act*, § 32.

Mr. Bagshawe, Q. C., in reply:

The words "entitled to the possession or to the receipt of the rents and profits" are a conventional expression used throughout the Act to indicate the beneficial owner of the property. *Grey v. Jenkins* [26 Beav. 351]. Mrs. Taylor is the beneficial owner, and upon making application to the Court, would, according to the ordinary practice, be let into possession of the property.

[He also referred to *Tidd v. Lister*.]

Sir G. JESSEL, M. R.¹⁶ The question which I have to consider is, the proper construction to be put on the 32d section of the *Leases and Sales of Settled Estates Act* [19 & 20 Vict. c. 120 (1856)] under the circumstances I am about to mention. * * *

Now, the material part of the 32d section of the Act is this: "It shall be lawful for any person entitled to the possession or to the receipt of the rents and profits of any settled estates for an estate for life," to lease for any term not exceeding twenty-one years, "provided that every such demise be made by deed, and the best rent that can

¹⁵ *Pugh v. Vaughan*, 12 Beav. 517 (1850); *Davis v. Hunter*, 23 Ga. 172 (1857); *Dick v. Pitchford*, 21 N. C. 480 (1837); *Wickham v. Berry*, 55 Pa. 70 (1867).

¹⁶ Only a part of the opinion is given.

reasonably be obtained be thereby reserved, without any fine, or other benefit in the nature of a fine, which rent shall be incident to the immediate reversion," the demise not to be made without impeachment of waste, and to contain covenants for the payment and receipt of the rent, and such other usual and proper covenants as the lessor shall think fit, and a condition for re-entry. That is, therefore giving to the person making the demise a very great power of management, because in the case of the trustees being appointed managers by the will, it is enabling the person said to be the beneficial tenant for life not only to lease without their consent, but to impose such terms on the lessee as the tenant for life, or so-called tenant for life, shall think fit. It is a very strong interference, therefore, with the management of the estate, and the question is, whether the Legislature intended that to apply when the tenant for life was not the manager of the estate. I do not think the Legislature did so intend. In the case I have before me the management is in the trustees. They are clearly by the express terms of the will, the persons to receive the rents. They are the persons to pay the charges of insurance, repairs, collections, and other necessary outlay, besides the annuities, and so on. Clearly, therefore, as far as the words and meaning of the will are concerned, they are to have the management, and are to dispose of and apply the net annual income and rents that may be left to the lady, and for her separate use if she should be married. As far as the will is concerned, and as far as the express intention of the testator can be gathered from his words, the trustees are managers of the estate.

Then it is said, and truly said, that there are certain cases in which, although similar words have occurred in wills, the Court of Chancery has thought fit to put the tenant for life in possession. I agree, but I say it is subject to the judicial discretion of the Court. It is not the right of the tenant for life to be in possession. The tenant for life is not entitled to the possession, but the court has a power, notwithstanding similar expressions in a will, to say that, looking to the whole will, the intent can be fully accomplished by putting the tenant for life in possession, taking security from the tenant for life either in the shape of an undertaking (if that shall be thought sufficient) or, in some instances, other substantial security, that what remains to be done under the will for the benefit of persons other than the tenant for life, shall be duly performed. The tenant for life in such a case is not a person entitled to possession, but a person who may obtain possession by judicial process, and to whom the trustees ought not to hand over the possession unless either by the leave of the court, or, if they choose to act without the leave of the court, then by taking such security as would indemnify them hereafter from any breach by the tenant for life of those duties which the trustees ought themselves to perform. Therefore, in such a case as I have before me, I am of opinion that this lady is not entitled to the possession.

Then the next point is as to the receipt of the rents and profits. That is the same thing. The trustees are the persons who, by the will, are directed to receive the rents and profits. I agree that I might upon terms take the receipt from them. I might possibly do so even in this case, but then the tenant for life is not entitled to the receipt. She may obtain it through the intervention of the court, but she is not a person entitled, in my opinion, to the receipt. The very notion that this Act of Parliament was to allow a person entitled to the residue of the rents and profits to take away the management and letting of the estate from the trustees while they remained in actual management and in receipt of the rents, is, according to my judgment, wholly repugnant to the ordinary proceedings of the Legislature in not interfering with the testamentary dispositions of men more than is absolutely necessary. I think that the Act has no application, and that there is no power of this sort, and the application must be refused.¹⁷

E. A. COX and Wife, BARBARA, v. ARETUS WILLIAMS
and Others.

(Supreme Court of North Carolina, 1859. 58 N. C. 150.)

Cause removed from the Court of Equity of Jones County.

Lewis Williams, by his will devised and bequeathed, among other things, as follows, viz: "Having no confidence whatever in E. A. Cox, the husband of my daughter, Barbara, I give and bequeath and devise unto my son, Aretus Williams, his heirs, executors, administrators and assigns, forever, the following property, that is: The tract of land whereon I now reside, subject to the life estate of my wife therein, and a negro woman, named Sarah, in special trust and confidence, nevertheless, that he and they will hold the same for the sole and separate use and benefit of my daughter, Barbara Cox, and during her natural life, in such manner that the same shall in no event be subject to the control or liable for the debts, or contracts, of her husband, E. A. Cox, and I wish Aretus, or his executors, etc., to allow his sister, Barbara, either on the said place to live, or rent it out," with ulterior limitations of the trust to the children of the said Barbara. In a subsequent clause, he gives to his wife a number of slaves for her life, with remainder to Aretus Williams, in trust, for the sole and separate use of Barbara Cox, as in the preceding clause. Mrs. Irena Williams, by deed, properly authenticated, surrendered to Aretus Williams her life estate in the land and slaves, given her by the will of her husband, to hold the same as trustee for Mrs. Cox, according to the trusts declared in the foregoing will.

Cox, the husband, and his wife, filed this bill against the trustee,

¹⁷ Affirmed L. R. 3 Ch. Div. 145 (1876).

setting out that it would greatly promote the comfort of the family of Mrs. Cox, and preserve and increase the value of the land and slaves intended for her benefit, for her and her husband, to have the possession of the property for the purpose of carrying on farming operations, and pray that a decree may pass the court to that effect.

The defendant demurred to the bill, generally, for the want of equity.

The cause was set down for argument on the demurrer, and sent to this court by consent.

PEARSON, C. J. The object of the bill is to have the land and negroes put into the possession of the feme plaintiff, so as to let her have the use of the property for the purpose of carrying on a farm, without the control and superintendence of the trustee, and the equity is put on the ground, that she would thus be furnished with a comfortable home, and her support and maintenance be better provided for than by allowing the property to continue under his management. The defendant has filed a demurrer, and, in support of it, urges: that if the property is put into the possession of the feme plaintiff, it would, as matter of course, be subject to the control and management of her husband, the other plaintiff, and thereby defeat the purpose of the trust, and be in direct violation of the expressed directions of the testator.

It is clear, from a perusal of the will, that the testator did not intend that the property, the use of which is given to his daughter, should, in any event, be subject to the control of Cox; for this reason, he gives the property to his son, so that it may be under his management; and, to remove all room for doubt, he sets out, in so many words, that he does so, because "he has no confidence whatever in E. A. Cox, the husband of his daughter."

In respect to the land, he relaxes, in some degree, and gives to his son a discretion "either to let his sister live on the place, or rent it out," but this restricted discretion tends to show, the more plainly, that in regard to the negroes, there was to be no discretion, and his son was to keep them under his exclusive management. So, it is manifest, that the object of the bill is in direct contravention of the trusts declared by the testator. See how it would operate. Suppose, instead of merely permitting his sister "to live on the place," which is within his discretion, the trustee should be required, by a decree of this Court, to let his sister have possession of the plantation and the negroes also; it would become necessary, in order to carry on the farm, that horses, cattle, farming utensils, etc., should be provided, and as she is under the control of her husband, it would follow that the entire management and control of the concern would fall into his hands.

A testator has a right to give his property with such restrictions, and upon such terms, as he sees proper, and the courts are bound to carry his intention into effect, unless there be something in the trusts

unlawful and against public policy. So that, so far from showing an equity, the plaintiffs, on their own showing, have none.

We deem it unnecessary to refer to any authority, and put our decision upon the peculiar circumstances growing out of the special provisions of this will.

PER CURIAM. Bill dismissed.

In re WYTHES.

WEST v. WYTHES.

(In Chancery, before Kekewich, J., 1893. Law Reports [1893] 2 Ch. 369.)

Adjourned summons.

George Wythes, of Bickley Park, Kent, and Copt Hall, Essex, by his will, dated the 5th of September, 1882, appointed executors and trustees, and devised to them all his real estate, upon trust, as to his Bickley Park estate, during the life of George E. Wythes, the eldest of his two grandsons, out of the rents and profits to provide for the education of the said George E. Wythes until he should attain twenty-one, and to accumulate any rents and profits not so applied, and upon his attaining that age to pay the rents and profits of the Bickley Park estate to him during his life, or until he should become a bankrupt, or should assign, charge, or incur, or attempt or affect to assign, charge or incur, the same rents and profits, or some part thereof, or should do or suffer something whereby the same or some part thereof would, through his act or default, or by the action or process of law or otherwise, if belonging absolutely to him, become vested in or payable to some other person or persons; and after the determination of the trust in favor of such grandson in his lifetime the trustees were to apply the rents and profits in their discretion for the maintenance and support of such grandson and his wife (if any), and child or children and other issue, and accumulate the unapplied residue; and after the death of such grandson the trustees were to stand possessed of the Bickley Park estate in trust for his child or children as he should by deed or will appoint, and if there were no such children, upon the trust declared concerning the testator's Copt Hall estate in favor of his grandson Ernest J. Wythes and his issue. The testator then devised his Copt Hall estate upon trusts in favor of his grandson Ernest J. Wythes, corresponding with the trusts of the Bickley Park estate in favor of his grandson George E. Wythes. The testator empowered the trustees and trustee of his will, "at their and his own uncontrolled discretion," during the continuance of the trusts of his will relating thereto, "to maintain, manage, and improve all or any part or parts of his real estates, and lay out all or any of the surplus rents and profits directed to be accumu-

lated as aforesaid in the maintenance, management, and improvement, by buildings, drainage, roads, or otherwise howsoever, of the hereditaments which had produced such rents and profits, or any other hereditaments held upon the same trusts, and also to demise all or any part of the real estates at such rents and subject to such covenants, and generally in all respects upon such terms and conditions as they or he should in their or his uncontrolled discretion think fit." The testator also provided that the trustees or trustee of his will should have a power of sale and exchange over all or any of the hereditaments thereinbefore devised on trusts exercisable during the life of any tenant for life in possession of the premises proposed to be sold or exchanged with his consent in writing, and as to such premises during the minority of any child or children of such tenant for life at the discretion of the trustees or trustee. And after conferring large powers of management on the trustees in connection with his business and otherwise, the testator authorized them to transact all matters and concerns respecting his business and estate, and to do or cause to be done all acts relative thereto in such and in the same manner to all intents and purposes as if such trustees or trustee were absolutely interested therein, and as he (the testator) could have done if living, it being his intention to give such trustees and trustee the amplest possible discretionary power with reference to the disposition and management of his business and concerns in any contingency, howsoever unforeseen, which might arise, and without such trustees or trustee being answerable to any persons interested under his will for the exercise of such discretion as was thereby given to them or him, or the mode in which they or he might carry into effect any such powers.

The testator died in 1883. His grandson, George E. Wythes, died a bachelor in 1887.

The Bickley Park estate was subject to a mortgage of £80,000.

Ernest J. Wythes had attained the age of twenty-one years. It did not appear that he had become bankrupt, or had in any way assigned, charged, or incumbered, or affected to assign, charge or incumber the rents and profits of the Bickley Park or Copt Hall estates.

The Bickley Park estate was a building estate. The Copt Hall estate was agricultural and was let on lease.

This was a summons by Ernest James Wythes asking that he might be let into possession and into the receipt of the rents and profits of the Bickley Park and Copt Hall estates, on his undertaking to pay and keep down, out of the rents and profits of the Bickley Park estate, the interest upon the mortgage for £80,000; and that the trustees might deliver to him the deeds and documents of title relating to the two estates respectively, including the counterparts of current leases and agreements for leases (but not including the probate of the tes-

tator's will and a deed of disclaimer by one of the persons named as trustees), the applicant undertaking not to part with such deeds and documents without the consent of the trustees, and to produce them to the trustees upon all reasonable occasions.

KEKEWICH, J. It would not have been satisfactory to make such an order as is asked in Chambers. The matter deserved the full attention which it has received in open court. Inasmuch as there was no hostile argument, there is no occasion for me to go through the authorities, or to recapitulate the rules deducible from them, or to explain in detail how far recent legislation has qualified them or rendered them inapplicable. On the other hand, it must be borne in mind that the applicant's case was placed before the court by the Solicitor General as fully and with as much precision as if he was encountering opponents, as counsel for the trustees were prepared to insist upon any point, requiring consideration, not thus brought out. And not only during the argument, but since, I have thought it my duty to reflect on the case made by the applicant, and to consider all the authorities cited with special reference to the provisions of the Settled Land Acts, on which the applicant's case was rested. My conclusion is that the Solicitor General's argument is sound, and that the old authorities, of which *Tidd v. Lister* [5 Mad. 429] may be taken to be the type, and which were summarized by the late Master of the Rolls in *Taylor v. Taylor* [L. R. 20 Eq. 297], may be treated as largely, if not altogether, abrogated by the Acts just mentioned. I must not be understood as saying that even now an equitable tenant for life, where the trustees in whom the legal estate is vested have duties of management and the like to perform, is entitled, as a matter of course, to be let into possession; but I intend to hold that the powers granted to and the duties imposed on a tenant for life, as defined by the Settled Land Acts (which definition clearly includes an equitable tenant for life such as the applicant), have raised a presumption in favor of the title to possession which did not before exist, and have made it incumbent on the court to provide that, if the estate and the trustees can be adequately protected by reasonable safeguards, an equitable tenant for life shall be let into possession and be enabled personally to exercise these powers and discharge these duties unless there be found some reason to the contrary far more urgent than is disclosed by the terms of this will. The point is in a great measure new. It was before Mr. Justice Pearson in *In re Bentley* [54 L. J. Ch. 782], and I have no doubt, from a perusal of his judgment, that he would have decided this case as I am now deciding it. The title to possession once established, the custody of the title deeds appears to follow, unless, of course, there is in any particular case reason for distinction. As regards the deeds, the case of *In re Burnaby's Settled Estates*, before Mr. Justice Stirling [42 Ch. Div. 621], is distinctly in point. There was

no opposition there; but the arguments for the applicant were based on the provisions of the Settled Land Acts, and the learned Judge must be taken to have assented to them as I do.¹⁸

SECTION 3.—THE TRUSTEE'S DUTY TO GIVE INFORMATION AS TO THE TRUST ESTATE.

LOW v. BOUVERIE.

(In the Court of Appeal, 1891. Law Reports [1891] 3 Ch. 82.)

The plaintiff being about to deal with an equitable tenant for life under a settlement by lending him money upon the security of his life interest, caused inquiries to be made of the defendant, one of the trustees of the settlement, whether the life interest was incumbered. Defendant replied that the life interest was subject to certain incumbrances, mentioning them, but did not say there were no others. The plaintiff then made a loan to the life tenant on the security of a mortgage of his equitable life interest. Subsequently the plaintiff found that the life interest was subject to several incumbrances prior to his own, besides those mentioned by defendant, the existence of which, it was admitted, the defendant had forgotten when replying to the plaintiff's inquiries, though he had had notice of them. The plaintiff's security being insufficient, he sued the defendant to have him declared liable for the amount due on the security, alleging that the loan was made upon the faith of the defendant's representation.

Mr. Justice North decided in favor of the plaintiff and the defendant appealed.

LINDLEY, L. J.¹⁹ This appeal raises several extremely important questions. First, it is necessary to consider what are the duties of trustees towards persons about to deal with their *cestuis que trust*, and who, before dealing with them, make inquiries of their trustees as to any assignments or incumbrances known to them.

In *Browne v. Savage* [4 Drew. 635, 639], Vice Chancellor Kindersley said that trustees "must, for their own security, give correct information, when inquiry is made of them, whether they have had notice of any prior assignments affecting their trust property." Mr.

¹⁸ In *re Bentley*, 54 L. J. Ch. 782 (1885); In *re Bagot's Settlement*, L. R. (1894) 1 Ch. 177 (1893); In *re Newen*, L. R. (1894) 2 Ch. 297.

¹⁹ The statement of facts is condensed, and the opinions of Bowen and Kay, L. J., and a part of the opinion of Lindley, L. J., are omitted.

Lewin, in his well known work (*Lewin on Trusts* [8th ed.] p. 704), refers to that case as an authority for the proposition that trustees are bound to answer such inquiries. But when this opinion is examined it can scarcely be supported, and if such a doctrine were logically carried out it would impose very serious duties upon trustees. The duty of a trustee is properly to preserve the trust fund, to pay the income and the corpus to those who are entitled to them respectively, and to give all his *cestuis que trust*, on demand, information with respect to the mode in which the trust fund has been dealt with, and where it is.²⁰ But it is no part of the duty of a trustee to tell his *cestui que trust* what incumbrances the latter has created, nor which of his incumbrancers have given notice of their respective charges. It is no part of the duty of a trustee to assist his *cestui que trust* in selling or mortgaging his beneficial interest and in squandering or anticipating his fortune; and it is clear that a person who proposes to buy or lend money on it has no greater rights than the *cestui que trust* himself. There is no trust or other relation between a trustee and a stranger about to deal with a *cestui que trust*, and although probably such a person in making inquiries may be regarded as authorized by the *cestui que trust* to make them, this view of the stranger's position will not give him a right to information which the *cestui que trust* himself is not entitled to demand. The trustee, therefore, is, in my opinion, under no obligation to answer such an inquiry. He can refer the person making it to the *cestui que trust* himself.

I will next take the case of a trustee who answers the inquiry. What in this case is the extent of his obligation? Is he bound to find out the facts—bound to make inquiries of his co-trustees or of the solicitor of the trust? Or is his obligation limited to giving such information as he himself can give without inquiry or research? I am not aware of any principle or authority which imposes upon him any obligation to do more than give an honest answer to the inquiry—that is to say, to do more than answer to the best of his actual knowledge and belief. He may, no doubt, undertake a greater responsibility. He may bind himself by a warranty, or he may so express himself as to be estopped from afterwards denying the truth of what he said; but unless he does one or the other, I do not know on what principle consistent with *Derry v. Peek* [14 App. Cas. 337] he can, if he answer honestly, expose himself to liability. * * *

²⁰ In *Loud v. Winchester*, 52 Mich. 174, at page 183, 17 N. W. 784, at page 787 (1883), Campbell, J., says: "The beneficiaries under a trust have the right to be kept informed at all times concerning the management of the trust, and it is the duty of the trustees to so inform them."

See, also, *Walker v. Symonds*, 3 Sw. 1, 58 (1818); *Newton v. Askew*, 11 Beav. 145 (1848); *In re Dartnall*, L. R. (1895) 1 Ch. 474.

In re TILLOTT.
LEE v. WILSON.

(In Chancery, before Chitty, Justice, 1891. Law Reports [1892] 1 Ch. 86.)

Motion.

James Tillott, by his will dated the 11th of July, 1868, after appointing trustees and executors, bequeathed his leasehold messuages, 12 and 13 Amshurst Road, Hackney, to his trustees upon trust to pay the net proceeds arising therefrom to his daughter Mary Ann Lee, for her life, and after her decease upon trust for such of her children living at her death, and such issue then living of her children then dead as either before or after her decease should, being males, attain twenty-one, or, being females, should attain that age or marry, and if more than one, as tenants in common according to the stocks; and he devised and bequeathed the residue of his estate to his trustees upon trust, as to one equal third part, to pay the net annual income to each of his three daughters, the said Mary Ann Lee being one, during their lives, and on the death of each daughter, as to the share in which she had a life interest, upon similar trusts for their children as those above mentioned with regard to the leaseholds bequeathed upon trust for Mary Ann Lee.

The plaintiff, being one of the children of Mary Ann Lee, who was still alive, commenced this action by originating summons, and asked by this summons that the defendant, as trustee of the testator's will, might be directed to sign and deliver to the plaintiff an authority enabling the plaintiff, his solicitor and agents, to ascertain the amount of consols standing in the name of the defendant, and what stop orders and distringases (if any) had been placed thereon, and to produce all deeds, papers, and documents in his possession relating to the property held by the defendant as trustee of the will, and to furnish the plaintiff with a general account of the residuary estate.

By an order made in Chambers dated the 3d of August, 1891, it was ordered that the defendant should forthwith write a letter to the Bank of England authorizing the bank to inform the plaintiff as to the amount of consols standing in the name of the defendant, or to verify the same by affidavit, and to produce for the inspection of the plaintiff all deeds and documents relating to property in which the plaintiff was interested under the will of the testator. The defendant accordingly wrote the letter to the bank as directed by the order.

This was a motion by the plaintiff that the above order might be discharged or varied, and that the defendant might be directed to sign and deliver to the plaintiff, an authority to the bank, enabling the plaintiff to ascertain what stops, notices or distringases had been placed on the consols standing in the name of the defendant.

CHITTY, J. In pursuance of an order made in Chambers the defendant has written a letter to the bank, on the authority of which the

bank has given to the plaintiff information which shows that a sum of stock is actually standing in the name of the trustee. The plaintiff, however, requires something more; he asks for an authority which will enable him to obtain information from the bank as to whether there are any stop orders on the fund; his object in asking for this information is to deal with his own share in the trust estate, his share being one-twelfth, to which he is entitled contingently on the death of his mother. It is no part of the duty of a trustee to assist a cestui que trust in mortgaging or, as Mr. Justice Lindley added, "in squandering or anticipating his fortune," *Low v. Bouverie* [L. R. (1891) 3 Ch. 89, 99], but a testator is bound to give a cestui que trust proper information as to the investment of the trust estate, and where the trust estate is invested on mortgage, it is not sufficient for the trustee merely to say, "I have invested the trust money on a mortgage," but he must produce the mortgage deeds, so that the cestui que trust may thereby ascertain that the trustee's statement is correct, and that the trust estate is so invested. The general rule, then, is what I have stated, that the trustee must give information to his cestui que trust as to the investment of the trust estate. Where a portion of the trust estate is invested in consols, it is not sufficient for the trustee merely to say that it is so invested, but his cestui que trust is entitled to an authority from the trustee to enable him to make proper application to the bank, as has been done in this case, in order that he may verify the trustee's own statement; there may be stock standing in the name of a person who admits he is a trustee of it, which at the same time is incumbered; some other person having a paramount title may have obtained a charging order on the stock or placed a *distringas* upon it.

The question here is whether the cestui que trust is not entitled, in addition to the information that he has obtained, to the further authority to the bank for information which will, besides verifying the trustee's statement, that the trust money is invested in the stock, also enable him to ascertain that the stock is free from incumbrance or free from any paramount claim. In the case before me there is no suggestion that the trustee is wrong, there is no charge of any sort made against him, though Mr. Wheeler tried to suggest a possible case and did suggest that there might be some kind of paramount claim affecting the stock in question, yet there is no suggestion to be found on the evidence in the case, but still, I think, now that the matter has been brought before me and discussed, that the cestui que trust is entitled to the further information that he now asks for, which will enable him to go back with an authority from the trustee, on which the bank will show that the fund is either clear of all *distringases* and the like or that it is not. I quite agree with what fell from counsel for the defendant that this may give the plaintiff more information than he is entitled to ask, because as there are twelve shares in this fund, it may be that there are several *distringases* on

the fund obtained by persons who have charges on the contingent interest of the other persons, and it is clear that the trustee is not bound to give the cestui que trust of one share any information as to the dealings of the other cestui que trust in whose share he has no interest, showing whether those shares are or are not incumbranced. I think, then, for these reasons, that there ought to be a further order in the terms the plaintiff asks for, but the plaintiff must pay the costs of the motion.²¹

In re POSTLETHWAITE.

In re RICKMAN.

POSTLETHWAITE v. RICKMAN.

(In Chancery before North, Justice, 1887. Law Reports, 35 Ch. Div. 722.)

Joseph Legg Postlethwaite, William Charles Rickman, and John Joseph Tourle, were the trustees of the will of William Postlethwaite, deceased. Joseph Legg Postlethwaite was beneficially interested in the proceeds of sale of the testator's residuary real and personal estate. Joseph Legg Postlethwaite was now dead. The plaintiffs were his three children, and were entitled to his interest under the will of William Postlethwaite. William Charles Rickman was also dead;

²¹ It is the trustee's duty to keep clear and correct accounts of the trust property and to be ever ready to produce them for inspection by the cestui que trust or the cestui que trust's agent. *White v. Lady Lincoln*, 8 Ves. 363 (1803); *Freeman v. Fairlie*, 3 Mer. 24, 43 (1817); *Anonymous*, 4 Mad. 273 (1819); *Pearse v. Green*, 1 J. & W. 135 (1819); *Clarke v. Earl of Ormonde*, Jacob, 108, 120 (1821); *Turner v. Corney*, 5 Beav. 515 (1841); *Ottley v. Gilby*, 8 Beav. 602 (1845); *Gray v. Haig*, 20 Beav. 219 (1854); *Springett v. Dashwood*, 2 Giff. 521 (1860); *Kemp v. Burn*, 4 Giff. 348 (1863); *Wroe v. Seed*, 4 Giff. 425 (1863); *Green v. Brooks*, 81 Cal. 328, 22 Pac. 849 (1889); *Waterman v. Alden*, 144 Ill. 90, 32 N. E. 972 (1893); *Blauvelt v. Ackerman*, 23 N. J. Eq. 495 (1873); *Elmer v. Loper*, 25 N. J. Eq. 475, 482 (1875); *In re Gaston Trust*, 35 N. J. Eq. 60 (1882), affirmed in *Veghte v. Steele*, 35 N. J. Eq. 348 (1882); *Martin v. Wilbourne*, 66 N. C. 321 (1872); *Walker v. Sharpe*, 71 N. C. 257 (1874); *Libbett v. Maulsby*, 71 N. C. 345 (1874).

It is the trustee's duty to produce all deeds and documents relating to the trust estate for inspection by the cestui que trust or the cestui que trust's agent. *Clarke v. Earl of Ormonde*, Jacob, 108, 120 (1821); *Gough v. Offley*, 5 De G. & Sm. 653 (1852); *Bugden v. Tylee*, 21 Beav. 545 (1856); *Smith v. Barnes*, L. R. 1 Eq. 65 (1865); *Simpson v. Bathurst*, 5 Ch. App. Cas. 193 (1869); *In re Cowin*, L. R. 33 Ch. Div. 179 (1886).

It is the trustee's duty to produce for inspection by the cestui que trust or by the cestui que trust's agent cases submitted to counsel and opinions thereon furnished by counsel to guide him in the due administration of his trust. *Devaynes v. Robinson*, 20 Beav. 42 (1855); *Wynne v. Humberston*, 27 Beav. 421 (1859); *Talbot v. Marshfield*, 2 Drew. & Sm. 549 (1865); *Re Mason*, L. R. 22 Ch. Div. 609 (1883).

The trustee, however, is not bound to produce for such inspection cases submitted and opinions of counsel thereon taken to defend himself against legal proceedings by the cestui que trust. *Brown v. Oakshott*, 12 Beav. 252 (1849); *Devaynes v. Robinson*, 20 Beav. 42 (1855); *Wynne v. Humberston*, 27 Beav. 421 (1859); *Talbot v. Marshfield*, 2 Drew. & Sm. 549 (1865).

the defendants were his executors and John Joseph Tourle, the surviving trustee of the will of William Postlethwaite.

The statement of claim alleged that a portion of the testator's estate had been sold to one James Walker, who was acting as trustee for William Charles Rickman, and was put forward by the latter for the purpose of concealing from Joseph Legg Postlethwaite and others interested in the estate that William Charles Rickman was the real purchaser; that the defendant Tourle had acted as the solicitor for himself and his co-trustee in winding up the estate, and that William Charles Rickman had made large profits in reselling the trust property bought for him. The plaintiffs sought to make the estate of William Charles Rickman and the defendant Tourle liable for such profits.

The defendants, the executors of William Charles Rickman, alleged in their statement of defence that the sale to Walker was made bona fide, and that their testator had subsequently bought from Walker. They had made an affidavit of documents, including a number of letters written by the defendant Tourle to their testator, and the bills of costs of the defendant Tourle. They claimed privilege from producing these on the ground that they were professional communications of a confidential character between their testator and the defendant Tourle, who in such communications acted professionally for their testator, and as his private solicitor, and not as solicitor for the trust, and were charged to and paid for by him out of his own money.

This was a summons on the part of the plaintiffs to compel the production of those documents.

NORTH, J.²² The defendants object to produce certain letters and copies of letters and correspondence between Tourle and Rickman in the years 1853 and 1854, and two bills of costs, on the ground that they were privileged. It is said that in that correspondence Tourle was acting as the private solicitor of Rickman and not as the solicitor of the trustees, and that those communications were paid for by Rickman personally out of his own moneys, and were made with the object of enabling him to procure legal advice and assistance as a private individual, and not as a trustee of the testator's will. And it is said that the bills of costs were prepared by Tourle in his private capacity, acting professionally for Rickman as a private individual and at his expense, and that they contained professional communications of a confidential character between Rickman and Tourle.

It seems to me that these documents ought to be produced, and on three grounds. In the first place, looking at the case made by the statement of claim (whether it will be proved or not I do not know and I assume that it is true only for the purpose of deciding the present question), I think that when a scheme is devised by two out

²² Only a part of the opinion is given.

of three trustees that one of the two shall purchase part of the trust estate in the name of a third party, and that this shall be concealed from the third trustee, so that the cestui que trust may know nothing about it, no professional privilege can avail to protect from production any correspondence relating to such a transaction as that. * * *

But, in the second place, Rickman and Tourle were acting together in relation to the trust estate. Tourle was himself one of the trustees, and he was the solicitor of all the trustees, and he also, in some totally independent matters acted as Rickman's solicitor. In my opinion it is not open to trustees to act together in such a way—the one acting as the professional adviser of the other—as to close the mouth of either of them in regard to matters relating to the trust. If they do so act, they must take the consequence of that which they had done not being treated as privileged. The difficulty of holding that privilege existed in such a case would be very great. Suppose that one of the cestuis que trust had made an assignment of his interest in the trust property of which notice had been given only to one of the trustees—Rickman. Suppose that no notice had been given by the assignee to Tourle, but that he had been informed of the assignment by Rickman when he was acting as Rickman's solicitor; could he decline to answer whether he had received notice on the ground that he was acting as Rickman's solicitor? In my opinion he could not, but the notice which he had received would have been received by him in his character of trustee, and he would be bound to disclose it. If two trustees acted together, not fraudulently, but unfairly to their cestui que trust, I think it would be a novel doctrine to say that they had a right to keep within their own bosoms that which they had done because one of them was acting as solicitor for the other.

The third ground is one which is peculiar to the present case. The executors, by their defence, deny that Walker was acting as trustee for Rickman for the purpose of concealing the fact that he was purchaser from the cestuis que trust. Adopting this as a true statement, it amounts to this, that what was done by Rickman and Tourle, before the sale to Walker, was done by them as co-vendors of the property to him, and not because Rickman had any independent interest by reason of the purchase from Walker. If this be so, what ground is there for saying that any relation of solicitor and client existed between Rickman and Tourle which can confer any professional privilege upon the communications between them? I think the statements in the executors' defence put them out of court. I therefore must order the production of these documents. With the consent of the counsel on both sides I have looked at the documents, and from what I have seen of them I think it is clear that they ought to be produced. But the defendants will have liberty to seal up such parts as are not relevant to the matters in question in this action.

SECTION 4.—THE TRUSTEE'S DUTIES OF MANAGEMENT OF THE TRUST ESTATE.

I. THE TRUSTEE'S DUTY TO TAKE THE STEPS NECESSARY TO SECURE THE TRUST ESTATE.

MARY JACOB and ROBERT ROTHWELL LUCAS and Others,
 Infants, by the Said MARY JACOB, Their Next Friend, Plain-
 tiffs, v. ROBERT TRISTRAM LUCAS and Others, Defendants.

(In Chancery before Lord Langdale, Master of the Rolls, 1839. 1 Beavan, 436.)

Stuckley Lucas, by his will, directed his children to assign to the trustees of his will certain stocks, funds and securities, to which they would become entitled under the testator's marriage settlement; and in default, that they should forfeit the benefits given them by his will. The testator gave part of his property, including the property in the settlement, to his trustees, Thomas Todd, John Henry Jacob, Richard Bere and John Beague, in trust as to part, for his son Robert Tristram Lucas, for life, with remainder to his children, and as to other part, for the benefit of persons defendants to the suit; and he appointed the four trustees his executors. The will contained a direction, that when any trustee should die or refuse to act, the surviving or acting trustees should appoint new trustees, "so that there might not be less than two acting trustees at any one time."

The testator died in 1811, and Thomas Todd and John Henry Jacob alone proved his will. Part of the testator's property consisted of £825. bank stock and £17. 10s. long annuities, standing in his name at the time of his death. The acting executors and trustees did not transfer these sums into their own names, but suffered them to remain in the name of the testator.

The settlement funds were assigned by the testator's children to the trustees of the will, but were permitted by them to remain standing in the names of the trustees of the settlement.

Thomas Todd died in 1819; and John Henry Jacob, who survived him, appointed no new trustee in his place. He died in 1828, having appointed the plaintiff, Mary Jacob, his sole executrix, who afterwards proved his will. After the death of John Henry Jacob, Robert Tristram Lucas, upon the renunciation of Bere and Beague, the two other executors who had not acted, obtained letters of administration de bonis non of the estate and effects of Stuckley Lucas; and, as administrator, he sold out the two sums of £825. bank stock and £17. 10s. long annuities, and he applied the same to his own use. This he was enabled to do, in consequence of the acting executors,

Thomas Todd and John Henry Jacob, having allowed these sums to remain in the name of the testator, Stuckley Lucas.

Robert Tristram Lucas assigned his interest under the will to secure £150. to John Wood; and, in 1822, he likewise charged it with an annuity of £32. to George Haynes, and, in 1834, he further charged it with an annuity of £106. 12s. to Mr. Rudall.

A suit of *O'Neil v. Lucas* had been instituted, to compel the specific legatees of Stuckley Lucas to contribute towards payment of his debts, there being a deficiency of assets to provide for the debts and legacies. In that suit, funds, in which Robert Tristram Lucas was interested under the will, had been paid into court. The effect of that suit was relied on in argument, but did not form the ground of the decision.

The bill was filed by Mary Jacob, the executrix of John Henry Jacob, who was the surviving acting executor and trustee under the will of Stuckley Lucas, and by the infant children of Robert Tristram Lucas (who were entitled in remainder to part of the property), by Mary Jacob, their next friend, against Robert Tristram Lucas, his incumbrancers, and against the personal representatives of Thomas Todd the other executor and trustee, and against the other parties interested, praying "that Robert Tristram Lucas might be decreed responsible for the said several sums of £825. Bank of England stock and £17. 10s. long annuities, which he had sold out and applied to his own use;" and that he might be decreed to replace those sums; and "in default thereof, that the several stocks, funds and securities, to which he might be held to be beneficially entitled under the said will, and in the said suit of *O'Neil* against Lucas, might be appropriated and applied in the liquidation and satisfaction of such several sums of stock and annuities."

The bill charged: "That Robert Tristram Lucas pretended that he was not liable to reinvest the said stock, or to supply any deficiency that might arise in respect thereof, but that the estates of Thomas Todd and John Henry Jacob, or one of them, were liable in respect of any loss incurred thereby; for that such several sums of stock ought, upon the death of the said testator, Stuckley Lucas, to have been invested in their names, and that they wilfully neglected to do so, and that in consequence thereof, they were guilty of a breach of trust, and ought to make good any loss occasioned thereby; whereas the plaintiff, Mary Jacob, expressly charged, that the said trustees and executors were never directed by the will to invest any such stock in their own names by said testator, and that independently of that circumstance, the same remaining outstanding was a protection to the interest of the cestui que trust, by remaining distinct and unmixed with other funds, over which they had control, and to which other parties were entitled."

THE MASTER OF THE ROLLS. The bill prays: [His Lordship stated the prayer.] It appears that Robert Tristram Lucas, as legal personal

representative of the testator Stuckley Lucas, procured these funds, in which he was entitled to a life interest, with remainder to the plaintiffs, his infant children, to be transferred into his own name, and that he has applied them to his own use. Nothing can be more clear than the equity of the plaintiffs to relief in respect to this gross breach of trust; and if this were all, it would be equally clear that the infant plaintiffs and those who have suffered from this breach of trust, are entitled to be recouped to the extent of the interest of Robert Tristram Lucas; he has not only committed these breaches of trust, but he has assigned his beneficial interest to other persons; and when the plaintiffs ask that his interest may be appropriated and applied in satisfaction of the breaches of trust, they come in instant competition with the other persons who have claims on the fund, either in the character of assignees or in the character of persons who, having suffered from these breaches of trust, are, as such, entitled to equal relief with the plaintiffs. It is necessary, therefore, to look beyond the simple circumstances to which I have adverted.

The testator died in 1811; by his will he appointed four persons to be his trustees and executors; two only proved; and it appears that his assets consisted of stocks, funds and securities standing in his name; he made gifts to his children on condition that they assigned to the trustees of his will certain settlement funds to which they were entitled; the children, it is said, assigned their interests and accepted the benefit under the will. Todd, one of the executors, died in December, 1819; and the other acting executor was Jacob, who died on the 13th of January, 1828. At that time a portion of the funds remained in the name of the testator; while that portion of the settlement fund, which he had purchased by gifts to his children, remained in the names of the trustees of the settlement. The acting executors and trustees did not declare the trusts specifically or convert themselves from executors to trustees, of the funds which were standing in the name of the testator, and did not procure the transfer of the settlement funds. Jacob, the survivor, having died in January, 1828, the two other persons who had been appointed executors and trustees renounced; and letters of administration, with the will annexed, were granted to Robert Tristram Lucas, who thereby took on himself the execution of the trusts of the will. At the time he procured the letters of administration to be granted to him, the funds were in this situation; partly in the name of the testator and partly in the name of the trustees of the settlement; and in this state of things the case of *O'Neil v. Lucas* was instituted. [His Lordship stated the nature of the suit of *O'Neil v. Lucas*.] There seems great difficulty in this suit not being connected with *O'Neil v. Lucas*, so as to enable the plaintiffs to avail themselves of the proceedings in that case. A bill, being necessary, is filed, not on behalf of the infants alone, but in conjunction with Mary Jacob, who is the legal personal representative of John Henry Jacob the surviving executor and

trustee, who, it appears, has been sought to be charged with a breach of trust. Mary Jacob, it is to be observed, is not at all personally responsible (except out of the assets of John Henry Jacob) for this breach of trust, which was of this nature; a certain number of trustees ought to have been kept up, which has not been done, and the funds were left in the name of the testator, and were never transferred into the names of the trustees; by these means Robert Tristram Lucas got possession of these funds, and was thereby enabled to commit this breach of trust. Another breach of trust complained of was this, that after Todd and Jacob had (the time of the assignment is not stated) obtained an assignment and transfer of the settlement funds, by which they became a portion of the testator's estate, they were permitted to remain in the names of the trustees of the settlement; the income was paid to the persons entitled, without any notice having been given to the trustees that the trust fund had become the property of the testator; and subject to the trusts of his will; Robert T. Lucas was permitted to receive the interest of the trust funds thus remaining in the hands of the trustees, and he proceeded to deal with it for the purpose of making incumbrances and granting annuities payable out of his interest. In this state of things, it is not to be wondered that those persons who are interested in the estate of the testator, and have suffered by the breaches of trust of Robert Tristram Lucas, should say that there is a remedy against the trustees in respect of those breaches of trust; and it is clear that if John Henry Jacob was answerable for them, his estate in the hands of Mary Jacob is also answerable. Now what is sought in this suit is, that the infant children of Mr. Lucas desire to be repaid out of his life estate; but in seeking payment out of that life estate, they come in competition with a great variety of other persons—with persons standing precisely in the same situation—having precisely the same rights and equities as they have, and with other persons, who under the circumstances I have mentioned, have become assignees of the interest of Robert Tristram Lucas. Suppose (which may possibly happen) that the life estate of Robert Tristram Lucas should turn out to be insufficient to pay all the several losses which the parties have sustained by the breaches of trust, who would then be the person next resorted to but those who have improperly permitted those breaches of trust to be committed? And these are the representatives of Todd and Jacob. I do not mean to decide any points of equity arising between the parties; but here I find the infant plaintiffs connected in the suit with a person with whom they may probably come into competition in the future stages of this cause. The answer which was made during the argument of this case was, that the joinder of Mrs. Jacob did not prejudice the infants at all, because any other person might file a bill and make Mary Jacob a defendant, and that she would not in any way be released by this suit. But is that a state in which things ought to be left? I confess I feel

it impossible to get over the difficulty; thinking, at the same time, there is a right on the part of the plaintiffs to equitable relief, if it were correctly brought forward, I should be disposed, if I could set everybody right as to costs, and if I could leave the question open as to the responsibility of Mary Jacob, to put the suit right, rather than dismiss the bill. I have no objection to let the cause stand over for a few days, to see if the parties can arrange it.

It being intimated to the court, that there was no prospect of the parties consenting to any arrangement,

THE MASTER OF THE ROLLS said: Then I must dismiss the bill with costs, without prejudice to the plaintiffs filing another bill, or adopting such proceedings as they may be advised, and without prejudice to any question as to the rights of the parties.²³

HEXT v. PORCHER.

(Court of Appeals of South Carolina, 1846. 1 Strob. Eq. 170.)

Before Johnston, Ch., at Gillisonville, February, 1846.

The facts of the case are stated in the following circuit decree.

JOHNSTON, Ch. This is a bill claiming redress for the alleged negligence of a trustee, by which the trust property has been lost to the *cestuis que trust*.

On the 15th of December, 1806, Sarah C. Porcher, the mother, and Lawrence Hext, the father of the plaintiffs, on the eve of their intermarriage, which shortly afterwards took place, entered into a deed of indenture with James Porcher, the intestate of the defendant, whereby the said Sarah C. conveyed all her individual interest in the estate of her deceased father, Peter Porcher, and of her deceased uncle, William Young, to the said James Porcher, in trust, after the marriage, for the joint use of herself and her intended husband, during their joint lives, and to the survivor of them, with remainders in fee, to the issue of the said Sarah C. by that or any subsequent marriage.

The trustee, James Porcher, caused the deed to be registered in the Registry of Mesne Conveyance for Beaufort District, thirteen or fourteen days after its execution, but it was never registered in the Secretary of State's office, and the original is now in the defendant's possession, as administratrix of the said trustee.

After the intermarriage of Lawrence Hext and wife, her shares in said estate were partitioned off to her, and there came into the possession of the husband a number of slaves, who, with their increase, now number some seventeen or eighteen.

All these slaves were sold to bona fide purchasers (without notice either by Lawrence Hext himself or by the sheriff) for his debts,

²³ See *Fenwick v. Greenwell*, 10 Beav. 412 (1847).

with the exception of two, as to which no relief is sought against the defendant. Lawrence Hext and his wife are now both dead, and the plaintiffs, who are the issue of the marriage, claim an account of the value of the slaves lost to them by the negligence of their trustee to register the deed in the proper office, so as to charge the purchasers of the trust property with notice, and enable the plaintiffs to recover it from them. It appears, from an examination of the Registry of Mesne Conveyance for Beaufort District, from 1787 to 1812, inclusive, that forty-six marriage settlements were recorded in that office, of which twenty-three were settlements of real and personal property, eighteen of personal property, and the remaining five of property the character of which is undefined.

This is the case stated by the counsel, for the consideration of the court; and the question is, whether, under these circumstances, the trustee was liable for the losses sustained by his omission to record the deed in the Secretary of State's office.

My impressions of this case have materially changed, since the hearing; and I cannot now say, as I would have said then, that the conduct of the trustee was or is to charge him. I do not doubt that it was his duty, after accepting the trust, to perform any act necessary for the preservation of the property, and for securing the interests of his *cestuis que trusts*, and to record the deed, as one means of attaining these ends.

Nor is it any longer a question, that the proper office for the registration of marriage settlements, under the Act of 1785, was that of the Secretary of State; although that seems to have been doubted, up to the decision of *Boatright v. Wingate*, 2 Tread. Const. 522, which was long after this deed was recorded, and it will appear, by the opinion of the Judges in that case, that one of them, who at the registration of this deed, was the leading counsel in Beaufort, and had the principal direction and control of the business there, was strenuously of opinion that such a registration as was made, in this case, was effectual and valid. My own opinion, while at the bar, was, and is still, that under the Act of 1785, settlements of personalty were to be recorded in the Secretary's office, and that as to settlements of realty, they were subject to a double registration; one in the Secretary's office, as settlements under the Act in question, and the other in the Registry of Mesne Conveyance, as deeds for conveying lands, under the Act upon that subject. The trustee, therefore, did not comply with the law, by the registration which he caused to be made in this case, and his *cestuis que trusts*, the preservation of whose interest was the very end of his appointment, have suffered loss by his omission.

But the liability of trustees is not measured by the abstract rule of their duty. The universal test of their liability, or exemption from liability, is this; is there, or is there not, in this case, evidence of faithful endeavors to fulfill it? The office of trustee is one essential

to every important interest in society, and so far from those interests being promoted, they would be deeply prejudiced, if any rule more rigorous than this—any rule calculated to deter prudent and honest men, of ordinary capacity, from accepting the appointment—were laid down, or insisted on. The partial effect of that rule would be to confine the office to the crafty and dishonest, who might accept with the hope of eluding liability, and securing profit by fraud and dexterity. The test of liability, as I have laid it down, is to be gathered from all the cases upon the subject, and I shall not trouble myself with an analysis of them. There may be strong expressions to the contrary effect, but the broad leading principle of all the cases is as I have stated it. It has sometimes been said, as I have laid it down in *Cooper v. Day*, 1 Rich. Eq. 26, that if the act done by a trustee, be such as a prudent man would not have done in his own affairs, or if that which the trustee has omitted, be what a prudent man would not have omitted in matters of personal interest, the trustee shall be liable. But this rule is manifestly subsidiary. It is used as a test of unfaithfulness, which, after all, is the fundamental ground of liability. If a trustee does, or omits, what a prudent man would not do or omit, in his own concerns, and there is no more in the case than that, it may be set down as presumptive evidence of indifference to his duty. And in the case I have mentioned there were circumstances (if their aid had been required) to give a tinge to the conduct of the trustee, and to strengthen the presumption arising from his unexplained omission to record the deed. But here the omission does not stand alone. There are circumstances which refute the presumption which might arise from it, and to show that the trustee was honest and diligent, but mistaken. The fault is not an omission to record, but a mistake in the office where it was done. The registration, though erroneous, is proof of a faithful intention to perform the duty required by law, which intention is none the less meritorious on account of the mistake. The mistake appears also to have arisen naturally from the general custom of the time, in which prudent men, trustees and others deeply interested, indulged; and it appears to have been grounded upon very high authorities.

I do not conceive, that to take advantage of a mistake, committed with an evidently honest endeavor by the trustee to perform his duty, and to make him liable for the consequences, would either square with the dictates of justice, or promote the true policy of the court or the interests of its sanctions, and it is ordered that the bill be dismissed.

The complainants moved to reverse the decision of his Honor, Chancellor Johnston, in the case above stated, on the following grounds:

1. Because it was made clearly to appear, by the bill, answer, exhibits and evidence, that the property to which complainants were entitled, had been lost in consequence of the negligence or omission of the trustee, James Porcher, to cause the trust deed to be registered

in the proper office, and therefore the estate of the said James Porcher should have been held liable for the loss so sustained.

2. Because it is conceded, by the very terms of the decree, that the trustee, James Porcher, was bound to cause the trust deed to be recorded; and it is respectfully submitted, that the fact that the trust deed was recorded in the wrong office, is not any proof of diligence, prudence or skill, nor is it any excuse.

3. Because the decree is contrary to law, equity and evidence. JOHNSTON, Ch., delivered the opinion of the court.

This court concurs in the decree of the Chancellor, and it is ordered that the decree be affirmed, and the appeal dismissed.

DUNKIN, Ch., and CALDWELL, Ch., concurred.

HARPER, Ch., absent at the hearing.

Appeal dismissed.²⁴

CANEY v. BOND.

(In Chancery, before Lord Langdale, Master of the Rolls, 1843. 6 Beav. 486.)

The object of the suit was to make an executor liable for a sum of money which had been lost by the insolvency of the debtor, on whose personal security the debt had been allowed by the executor to remain.

In 1825, the testator advanced to a Mr. Phillips a sum of £500., to be invested by the latter on some mortgage security. For securing it in the meantime, Mr. Phillips gave to the testator his promissory note, payable with interest.

In January, 1826, the testator died, and his will was proved by Jones and Bond, his executors. Shortly afterwards, Jones and one of the persons interested in the testator's estate pressed Bond to call in this debt, and to invest it in the funds; but Bond replied, "that he should not think of removing the money from Mr. Phillips's hands, as it was as safe there as if it were in the Bank of England." Other similar applications were afterwards made to Bond, but with no better success. In 1827 Bond received £100. from Mr. Phillips, in part payment, and the remainder was lost by the death and insolvency of Mr. Phillips in March, 1828. There was evidence to show that Mr. Phillips, if pressed earlier, would have paid the amount.

Under these circumstances, it was insisted, by the bill, that Bond was personally liable for the £400. and interest.

THE MASTER OF THE ROLLS. At the death of the testator, part of his estate was outstanding on personal security. It was the duty of the executors, quite independently of any application made to them by the persons interested in the estate, to take steps to get in this

²⁴ In *Cooper v. Day*, 1 Rich. Eq. 26 (1844), a trustee was held liable for loss resulting to his cestui que trust from his neglect to record a trust deed of land.

money. In the exercise of a fair discretion, they were not to commence legal proceedings unnecessarily, but they ought to have exerted themselves to get in the debt, and, if necessary, to have commenced compulsory proceedings to obtain it.

The persons beneficially interested, not considering the money safe where it was, requested the defendant Bond to get it in. Instead of complying with this request, he refused to do so, saying that the money was as safe as in the Bank of England; two years afterwards the money was lost by the insolvency of the debtor.

If, in any case, an executor is to be charged for wilful default, it is in a case of this sort, where the money not only is found on a security not sanctioned by the court, and which ought therefore to be got in, but where also the executor has been requested to call it in, and has refused on the ground that it is perfectly safe.

The defendant, by his conduct, has taken upon himself the risk of the security, and he must therefore be charged with it, and with the costs down to the hearing.²⁵

²⁵ *Lowson v. Copeland*, 2 Bro. C. C. 156 (1787); *Powell v. Evans*, 5 Ves. Jr. 839 (1801); *Tebbs v. Carpenter*, 1 Mad. 290 (1816); *Mucklow v. Fuller*, Jacob, 198 (1821); *Platel v. Craddock*, Cooper's Chy. Rep. 481 (1838); *Bullock v. Wheatley*, 1 Coll. 130 (1844); *Maitland v. Bateman*, 16 Sim. 233, note (1844); *Styles v. Guy*, 16 Sim. 230 (1848), affirmed 1 Mac. & G. 422 (1849); *Byrne v. Norcott*, 13 Beav. 336 (1851); *Wiles v. Gresham*, 2 Drew. 258 (1854); *Brittlebank v. Goodwin*, L. R. 5 Eq. 545 (1868); *In re Brogden*, L. R. 38 Ch. Div. 546 (1888); *In re Tucker*, L. R. (1894) 1 Ch. 724; *Duffee v. Buchanan*, 8 Ala. 27 (1845); *Hughes v. Mitchell*, 19 Ala. 268 (1851); *Royall's Adm'r v. McKenzie*, 25 Ala. 363 (1854); *Munden v. Bailey*, 70 Ala. 63 (1881); *Shepherd's Heirs v. Shephard's Adm'r*, 19 Fla. 300, 326 (1882); *Sanderson's Adm'r v. Sanderson*, 20 Fla. 292, 335 (1883); *Whitney v. Peddicord*, 63 Ill. 249 (1872); *Waterman v. Alden*, 144 Ill. 90, 32 N. E. 972 (1893); *Simpson v. Gowdy*, 19 Ind. 292 (1862); *State v. Gregory*, 88 Ind. 110 (1882); *Cross v. Petree*, 10 B. Mon. (Ky.) 413 (1850); *Hunt v. Gontrum*, 80 Md. 64, 30 Atl. 620 (1894); *Banks v. Machen*, 40 Miss. 256 (1866); *Moffatt v. Loughridge*, 51 Miss. 211 (1875); *McWilliams v. Norfleet*, 63 Miss. 183 (1885); *Booker v. Armstrong*, 93 Mo. 49, 4 S. W. 727 (1887); *Holcomb v. Coryell*, 11 N. J. Eq. 476 (1858); *Cooley v. Vansyckle*, 14 N. J. Eq. 496 (1860); *Poulson v. Johnson*, 29 N. J. Eq. 529 (1878); *Speakman v. Tatem*, 48 N. J. Eq. 136, 21 Atl. 466 (1891), affirmed 50 N. J. Eq. 484, 27 Atl. 636 (1892); *Shultz, Adm'r, v. Pulver*, 3 Paige (N. Y.) 182 (1832), affirmed 11 Wend. (N. Y.) 361 (1833); *Hollister v. Burritt*, 14 Hun (N. Y.) 291 (1878); *Harrington v. Keteltas*, 92 N. Y. 40 (1883); *Matter of Cornell*, 110 N. Y. 351, 365, 18 N. E. 142 (1888); *O'Connor v. Gifford*, 6 Dem. Sur. (N. Y.) 71 (1888); *Wilson v. Lineberger*, 88 N. C. 416, 422 (1883); *Long's Estate*, 6 Watts (Pa.) 46 (1837); *Johnston's Estate*, 9 Watts & S. (Pa.) 107 (1845); *Beckley's Appeal*, 3 Pa., 425 (1846); *Wills' Appeal*, 22 Pa. 325 (1853); *Charlton's Appeal*, 34 Pa. 473, 75 Am. Dec. 673 (1859); *Shaffer's Appeal*, 46 Pa. 131 (1863); *Stong's Estate*, 160 Pa. 13, 28 Atl. 480 (1894); *Carr's Estate*, 24 Pa. Super. Ct. 369, 375 (1904); *O'Dell v. Young*, *McMul. Eq. (S. C.)* 155 (1829); *Gates v. Whetstone*, 8 S. C. 244, 28 Am. Rep. 284 (1876); *Lowry v. McGee*, 3 Head (Tenn.) 269 (1859); *Holmes v. Bridgman*, 37 Vt. 28 (1864); *McClosky v. Gleason*, 56 Vt. 264, 48 Am. Rep. 770 (1883); *Rowe v. Bentley*, 29 Grat. 756 (1878); *Anderson v. Piercy*, 20 W. Va. 282, 330 (1882).

In re Brogden, L. R. 38 Ch. Div. 546 (1888), *Fry, L. J.*, said at page 572: "When the cestui que trust has shown that the trustee has made default in the performance of his duty, and when the money which was the subject of the trust is not forthcoming, the cestui que trust has made out, in my judgment, a prima facie case of liability upon the trustee, and if the trustee

SPEAKMAN v. TATEM.

(In Chancery, before Vice Chancellor Pitney, 1891. 48 N. J. Eq. 136.)

Final hearing on bill, answer and proofs.

Bill by cestui que trust against his trustee alleging that he neglected to collect and take possession of the trust fund, and praying that he might be charged with what he ought to have collected.

The trust was created by deed by husband (complainant) and wife to the trustee. It recited that Mrs. Speakman was entitled, as residuary legatee to a fourth part of the residue of the estate of her father John Draper, devised to her by his will and transferred the same to John C. Tatem in trust to recover, collect, and receive and hold the one-fourth part of the residue of the estate of John Draper, and after the death of either the said T. S. Speakman or Emma E. Speakman to pay to the survivor during his or her natural life one-third of the net income, and, on the death of such survivor, to pay over the corpus

desire to repel that by saying that if he had done his duty no good would have flowed from it, the burden of sustaining that argument is plainly on the trustee." See, in accord, *Styles v. Guy*, 16 Sim. 230 (1848); *Grove v. Grace*, 26 Beav. 103 (1858); *Re Hurst*, 63 L. T. R. 665, 668 (1890); *In re Sanderson*, 74 Cal. 199, 15 Pac. 753 (1887); *Shephard's Heirs v. Shephard's Adm'r*, 19 Fla. 300, 319 (1882); *Gordon v. Gibbs*, 3 Smedes & M. (Miss.) 473, 491 (1844); *Moffatt v. Loughbridge*, 51 Miss. 211, 224 (1875); *Williams, Adm'r, v. Heirs of Petticrew*, 62 Mo. 460, 471 (1876); *Julian v. Abbott*, 73 Mo. 580 (1881); *Booker v. Armstrong*, 93 Mo. 49, 59 (1887); *Powell v. Hurt*, 108 Mo. 507, 17 S. W. 985 (1891); *Harrington v. Keteltas*, 92 N. Y. 40, 45 (1883); *Johnston's Estate*, 9 Watts & S. (Pa.) 107 (1845); *Anderson v. Piercy*, 20 W. Va. 282, 324 (1882).

The trustee may escape liability by showing that probably more was to be got by indulgence to the debtor than by legal proceedings. *Walker v. Simonds*, 3 Sw. 1, 71, 72 (1818); *Ratcliffe v. Winch*, 17 Beav. 217 (1853); *In re Earl*, 39 W. R. 107 (1890); *Waring, Ex'x, v. Darnall*, 10 Gill & J. (Md.) 126 (1838); *Torrence v. Davidson*, 92 N. C. 437, 53 Am. Rep. 419 (1885); *Neff's Appeal*, 57 Pa. 91 (1868); *Dabney's Appeal*, 120 Pa. 344, 14 Atl. 158 (1888); *Tanner v. Bennett's Adm'r*, 33 Grat. (Va.) 251 (1880).

COMPROMISE.—The trustee may justify a compromise of a claim by showing that more was got thereby than could probably have been collected. *Blue v. Marshall*, 3 P. Wms. 381 (1735); *Pennington v. Healey*, 1 Crompt. & M. 402 (1833); *Moulton v. Holmes*, 57 Cal. 337 (1881); *Berry v. Parkes*, 3 Smedes & M. (Miss.) 625 (1844); *Long v. Shackelford*, 25 Miss. 559 (1853); *Wyman's Appeal*, 13 N. H. 18 (1842); *People v. Pleas*, 2 Johns. Cas. (N. Y.) 376 (1801); *In re Scott*, 1 Redf. Sur. (N. Y.) 234 (1847); *Choteau v. Suydam, Adm'r*, 21 N. Y. 179 (1860); *Bacot v. Heyward*, 5 S. C. 441 (1874); *Pool v. Dial*, 10 S. C. 440 (1878); *Alexander v. Kelso*, 3 Baxt. (Tenn.) 311 (1874); *Boyd's Sureties v. Oglesby*, 23 Grat. (Va.) 674 (1873); *Pusey v. Clemson*, 9 Serg. & R. (Pa.) 204 (1823).

A trustee is justified in not suing to collect a claim where there is no reasonable ground to believe that anything can be collected. *Bowen v. Montgomery*, 48 Ala. 353 (1872); *Succession of Pool*, 14 La. Ann. 688 (1859); *Smith v. Collamer*, 2 Dem. Sur. (N. Y.) 147 (1884); *Mitchell v. Trotter*, 7 Grat. (Va.) 136 (1850); *Anderson v. Piercy*, 20 W. Va. 282 (1882). Unless he is indemnified as to costs. *Griswold v. Chandler*, 5 N. H. 492, 494 (1831); *Sanborn v. Goodhue*, 28 N. H. 48, 59 Am. Dec. 398 (1853); *Hepburn v. Hepburn*, 2 Bradf. Sur. (N. Y.) 74 (1851); *Utley v. Rawlins*, 22 N. C. 438 (1839).

to the three children of said T. S. Speakman and Emma E. Speakman.

Attached to the deed was this acceptance: "John C. Tatem, the grantee above named, hereby assents to and accepts of the above conveyance and the trusts therein contained. John C. Tatem."

June 9, 1870, Mrs. Speakman deserted her husband and on November 6, 1874, he obtained a decree of divorce for such desertion. Mrs. Speakman died in 1887. During her life the trustee, Tatem, permitted the executors of John Draper to pay over to Mrs. Speakman the income and corpus of the one-fourth of the residue of her father's estate.

PITNEY, V. C.²⁶ * * * Another defence set up is, that the complainant never requested the trustee to execute the trust. If there had been no acceptance in writing, and, to the knowledge of complainant, nothing had been done by the trustee under the trust, there would be, as it seems to me, great force in that position. But the trustee accepted in writing, and undertook to execute the trust. The deed was produced by him at the hearing. He actually did in part execute it. * * * Says Mr. Lewin, p. 243: "As soon as a trustee has accepted the office he must bear in mind that he is not to sleep upon it, but is required to take an active part in the execution of the trust. The law knows not such a person as a passive trustee. * * * When a trustee has entered upon the trust he is bound at once to acquaint himself with the nature and particular circumstances of the property, and to take such steps as may be necessary for the due protection of it."

To the same effect is the language of Mr. Perry in his treatise on Trusts § 266. And having once accepted and undertaken the trust, he cannot of his own motion abandon it and evade its duties, and can only be relieved by the aid of a competent court. Perry, Trusts § 401; and see 2 Pom. Eq. Jur. § 1067, and note. These principles seem to me to be beyond dispute or question, and to be elementary and fundamental and a necessary part of the system of trusts. I am unable to perceive any difference in principle in respect to the question now in hand between the case of a trustee appointed by will and one by deed, where both have accepted the trust by unequivocal acts. In fact, it seems to me that executors, administrators, guardians of infants and lunatics, assignees in insolvency and bankruptcy, and trustees under marriage or other voluntary settlements, all stand upon the same plane in this respect, viz., that if they accept the office they must perform its duties actively, not passively, and must not wait upon the motion of the persons interested as *cestuis que trust* to incite and prompt their actions. The trustee must act in and look after the interest of all the *cestuis que trust* with perfect impartiality. The standard is this: He must use the same diligence in seeking for and

²⁶ Only a part of the opinion is given.

reducing the trust property to possession, and the same care in preserving it, that an ordinarily diligent and careful man would exercise and take in respect to his own property. It would be highly dangerous to adopt any other rule or to abate its rigor in the least. It is not necessary to illustrate by instances. In the case in hand some of those entitled in remainder were or might have been infants at the time the trustee permitted the funds here in question to pass into the hands of one of the donors. The trust was irrevocable, except by the consent of both donors. Suppose, now, Mrs. Speakman had squandered these funds or diverted them by will to other objects, would the rights of the remaindermen have been gone?

The disposition of courts of equity to hold trustees to an active attention to the duties of their office, is illustrated by the case of *Taylor v. Millington*, 4 Jur. (N. S.) 204, which in many of its aspects resembles the case before the court. See, also, *Youde v. Cloud*, L. R. 18 Eq. Cas. 634; *Ex parte Ogle*, L. R. 8 Ch. App. 711 (at page 716); *Butler v. Carter*, L. R. 5 Eq. Cas. 276; *Ex parte Graves*, 2 Jur. (N. S.) 651. * * *

In my opinion the complainant is entitled to relief to the extent of the money which the defendant did receive and might have received and which I ascertain to be the sum of \$12,895.²⁷ * * *

Ex parte OGLE. Ex parte SMITH.

In re PILLING.

(In the Court of Appeal in Chancery, 1873. Law Reports 8 Chancery Appeal Cases, 711.)

In this case there were two appeals from a decision of the judge of the County Court at Manchester.

The question in dispute arose under a deed of assignment dated the 21st of October, 1864, by which David Pilling, a leather factor at Manchester, assigned all his property to Edward Smith, as a trustee for his creditors. The deed was assented to by the requisite majority of creditors, and was registered under the 192d section of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134).

Mr. Ogle and other creditors charged the trustee with negligence and mismanagement of the estate, and claimed to surcharge him in the accounts which he had rendered in several particulars, and the charges were referred to the Registrar to report on the facts. The effect of his report, dated the 7th of May, 1872, so far as material to the present appeal, was as follows:

Item 1. As to wine sold to the debtor or allowed to remain in his hands.²⁸

²⁷ Affirmed 50 N. J. Eq. 484, 27 Atl. 636 (1892).

²⁸ Only so much of the report as affects item 1 is given.

The trustee discovered on the 19th of November, 1864, that there were 519 bottles of wine and 84 of brandy in the debtor's possession unaccounted for. The trustee instructed his solicitor, Mr. Simpson, to take legal steps for the recovery of the property. * * *

Mr. Simpson's managing clerk stated that the reason why more active measures were not adopted was that Mr. Simpson believed that the debtor intended eventually to pay for the wine, and that he wished to treat him in a friendly spirit and not hostilely. * * *

The charges arising out of the report were brought before the Judge of the County Court, and his Honor made an order to the following effect on the items which formed the subject of appeal:

Item 1: That the trustee should be surcharged with £130. as the value of the wine and spirit, with interest at £5. per cent., from the 3d of May, 1865. * * *

Mr. De Gex, Q. C., and Mr. Bagley, then opened the cross-appeal:

As to item 1: The trustee was not to blame in permitting the wine to remain in the debtor's possession. He did all that he could by placing the matter in the solicitor's hands. It is very doubtful whether the court, under the Act of 1861, had power to order a debtor to give up property which he kept possession of. At all events there is no authority for charging the trustee with interest on the value of the wine. A trustee is never charged with interest unless he has himself possessed and used the property. *Tebbs v. Carpenter* [1 Madd. 290]. In *Grove v. Price* [26 Beav. 103] no interest appears to have been charged, although the money was clearly lost by the trustee's negligence.

Sir W. M. JAMES, L. J. It appears to me that this was not merely a debt, but a deliberate breach of trust. No proceedings were taken against the debtor because he was a friend of the solicitor. The County Court Judge was, in my opinion, right in charging the trustee, not only with the value of the wine but with interest,²⁹ on the ground that it was a breach of trust.

Sir G. MELLISH, L. J., concurred.³⁰

²⁹ *Eppinger v. Canepa*, Ex'r, 20 Fla. 262, 288 (1883); *Scott v. Crews*, 72 Mo. 261, 267, 268 (1880); *Torbet's Heirs v. McReynolds*, 4 Humph. (Tenn.) 215 (1843); *Lowry v. McGee*, 3 Head (Tenn.) 269 (1859). Contra: *Lowson v. Copeland*, 2 Bro. C. C. 156 (1787); *Tebbs v. Carpenter*, 1 Madd. 290, 299 (1816); *Pulliam v. Pulliam* (C. C.) 10 Fed. 53, 60-67 (1881).

³⁰ *Harrison v. Mock*, 10 Ala. 185 (1846); *Id.*, 16 Ala. 616 (1849); *Royall's Adm'r v. McKenzie*, 25 Ala. 363, 372, 373 (1854); *Torbet's Heirs v. McReynolds*, 4 Humph. (Tenn.) 215 (1843).

II. THE TRUSTEE'S DUTY TO CONVERT INTO MONEY SO MUCH OF THE TRUST ESTATE AS IS NOT IN A PROPER STATE OF INVESTMENT.

HOWE v. EARL OF DARTMOUTH.

(In Chancery, before Lord Eldon, Chancellor, 1802. 7 Vesey, Jr. 137.)

William, Earl of Strafford, by his will, dated the 25th of October, 1774, gave to his wife Anne, Countess of Strafford, all his personal estate whatsoever (except the furniture of Wentworth Castle) for her life, subject to the following outpayments and legacies. He also left to her all his houses, gardens, parks, woods, and all his landed estates for her life; and afterwards all his personal and landed estates to his eldest sister Lady Anne Connelly, for her life; and then to the eldest son of George Byng, Esquire; and afterwards to his second, third, or any later sons he may have by the testator's niece Mrs. Byng; and then to the eldest son and other sons successively of the Earl of Buckingham by his niece Caroline; but all of them to be subject to the following outpayments and legacies. He left his wife the sum of £15,000. to dispose of forever as she pleases, and the value of £500. in furniture in Wentworth Castle, of whatever sort she chooses; else the whole furniture to be hers, if she meets with any difficulty in this disposition. He gave several legacies and annuities; and declared, he would have all his debts paid; and gave all his servants a year's wages.

The testator died on the 10th of March, 1791. Anne, Countess of Strafford, died in his life, on the 9th of February, 1785. Lady Anne Connelly filed a bill for an account of the personal estate, etc. By a decree, made at the Rolls on the 17th of May, 1793, the usual accounts were directed; and it was declared, that the plaintiff would be entitled to the interest of the clear residue of the testator's personal estate during her life; and an inquiry was directed, who were the next of kin of the testator at the time of his death.

The Master's report, dated the 7th of March, 1796, stated the account of the personal estate; part of which consisted of the following stocks and annuities, standing in the testator's name at his death: £4,320. bank stock; £9,572. per annum long annuities; £750. per annum short annuities.

Under orders made in the cause the sums of £15,000. and £4,000. had been paid in by the executors; and laid out in 3 per cent. consolidated bank annuities.

By a decretal order, made on the 7th of May, 1796, the balance of the personal estate in the hands of the executors, and of the interest, etc., was ordered to be paid into the bank; and that the executors should transfer the £4,320. bank stock, the £9,572. per annum long annuities, and the £750. per annum short annuities, to the Accountant General, in trust in the cause; and that the said funds, when so trans-

ferred, should be sold with his privity; and that the moneys to arise by such sale should be laid out in the purchase of 3 per cent. annuities, in trust in the cause, subject to farther order; and that the Master should appropriate a sufficient part of the said bank annuities, when purchased, to answer the growing payments of the several annuities; and that as any of the annuitants should die, the funds appropriated respectively, should fall into the general residue; with liberty to apply; and it was ordered, that the interest of the residue of the said bank annuities after such appropriation, and also the interest and dividends of the said £4,320. bank stock, should be paid to the plaintiff Lady Anne Connelly for her life; and on her death any person or persons entitled thereto were to be at liberty to apply; and after providing for the costs out of the balance of the personal estate, and for the arrears of the annuities out of the sum of £2,067. 6s. 1d. the balance of the interest and dividends received by the executors, and ordered to be paid into the bank, it was ordered, that the remainder should be paid to Lady Anne Connelly; and also, that £1,846. 9s. 7d. cash in the bank, which had arisen from interest of the funds, in which part of the testator's personal estate had been invested, should be also paid to her; and that the dividends of £24,619. 4s. 10d. 3 per cent. bank annuities, in which the sums received by the executors from the personal estate had been invested, should from time to time be paid to her during her life; and on her death any persons claiming to be entitled were to be at liberty to apply; and it was ordered, that the executors should get in the outstanding personal estate; and that so much thereof as should consist of interest, should be paid to Lady Anne Connelly; and so much as consisted of principal, should be paid into the bank, subject to farther order.

The Master's farther report, dated the 10th of December, 1796, stated, that the bank stock and the long and short annuities had been sold, and the produce laid out in 3 per cent. annuities.

Upon the death of the plaintiff Lady Anne Connelly, the suit was revived by her executors; and the cause coming on before Lord Alvanley, then Master of the Rolls, for farther direction on the subsequent report, it was insisted on the part of Mr. Byng, that Lady Anne Connelly had received for interest and dividends, accrued on the bank stock, and the long and short annuities, and the produce laid out in bank 3 per cent. annuities, large sums more than she was entitled to, if those funds had been sold, as they ought to have been, immediately after the testator's decease, and the produce invested in a permanent fund, viz., the 3 per cent. consolidated bank annuities. The Master of the Rolls directed inquiries with respect to that question between the executors of Lady Anne Connelly and Mr. Byng and the other parties interested in the residue of the personal estate; with liberty to present a petition to rehear the order of 1796, as to the payments thereby directed to be made to Lady Anne Connelly.

Mr. Mansfield, Mr. Lloyd, Mr. W. Agar, Mr. Wingfield, Mr. Sear-

gent Palmer, Mr. Bill and Mr. Richards, for different parties, in support of the petition of re-hearing.—The tenant for life of such funds as bank annuities, carrying a higher interest, and long and short annuities, wearing out rapidly, is not entitled to the enjoyment of them in specie; but there is a standing rule of the court for the benefit of all parties interested, that those funds shall be laid out in the more equal fund, the 3 per cents. No party ought to suffer by the circumstance, that what ought to have been done, and what the court would have directed to be done, immediately on the testator's death, was not done.

Mr. Romilly and Mr. Trevor, for the executors of Lady Anne Connelly, in support of the decree.—The first question is, whether Lady Anne Connelly was entitled to the annual produce of the personal estate at the death of the testator; if not, the next consideration is, whether, the executors having paid it to her, and particularly the dividends of the bank stock, those payments ought to be called back.

The personal estate is given to her for life specifically.

LORD CHANCELLOR [ELDON].³¹ No question arises upon this will, except, whether this is a specific bequest of such personal estate as was the testator's at the time of his death. * * * I am clearly of opinion, therefore, that this is not a case, in which the personal estate is in this sense specifically given, with a direction, that it shall remain specifically as it was at the testator's death; and the purposes, for which it is given, are those, for which it is admitted there is a general rule, that these perishable funds are to be converted in such a way as to produce capital, bearing interest.

I was astonished, when that was doubted, from general recollection. I have considered the practice to be, that the first moment the observation of the court was drawn to the fact, the court would not permit property to be laid out or to remain upon such funds under a direction to lay it out in government securities; but would immediately order it to be converted into that, which the court deems for the execution of trusts a government security. I pass over what has been said as to real securities, for there is a great difference between real securities, or bank stock, for instance, and government securities. Bank stock is as safe, I trust and believe, as any government security, but it is not government security; and therefore this court does not lay out, or leave, the property in bank stock; and what the court will decree it expects from trustees and executors. I will not state, what the court would do, where executors had not made these conversions. That depends upon many circumstances. But I abide by Lord Kenyon's rule in the case of Mr. Champion, an executor, before which time it was doubted, whether an executor could lay out the property in the 3 per cents. Lord Kenyon, who was a repository of valuable knowledge, produced a dictum of Lord Northington, that the court

³¹ Only a part of the opinion is given.

would protect an executor in doing what it would order him to do. The court in this case would order him to do that. It is not so in the case of a mortgage. The court would not permit a real security to be called in without an inquiry, whether it would be for the benefit of every person; and it is accident, that some part of the assets will produce more interest than a genuine trust security. In some instances there is little doubt, it may be not only for the benefit of the tenant for life, but for the substantial interest of the remaindermen that the property should not be shifted from a good real security.

The question then is, whether the court will change the fund, not as between the remaindermen and the executor, but in a question between the tenant for life and the remainderman; and the question with the executor cannot well arise, so as to be acted upon, till a failure by the tenant for life, or those, who represent him; for the justice of the case, if the tenant for life had received so much, would be, that he should bring it back in case of the executor, who paid him. If the rule is, that the fund shall not remain, it is impossible to say, the date of the decree shall decide. I do not like to put it upon the possibility of collusion: but that is not to be totally neglected; for it may happen, that the executor himself may be the tenant for life; and then he has an interest in delay. Of necessity there must be great delay, before there can be a final decree in a cause of great property; and it may be very much protracted, where there is an interest. However, I do not put it upon that. But, if the principle is, that the court, when its observation is thrown upon it, will order the conversion, it ought to be considered to all practical purposes as converted, when it could be first converted. That is the genuine inference from the other principle. If the court has ever attended to the difficulties, often thrown before it, with regard to perishable property of other kinds, as leasehold estate, etc., it never has as to stock. You can learn the price, at which it might be converted on any day; and the moment the court was ordered by the Legislature to lay out its funds in stock, it necessarily held, that for this purpose stock must always be considered of the same value. It is for the benefit of the creditor, that it should be thrown into a lasting fund; and it is equal to all the parties interested. As to bank stock, the court has ordered 4 per cents. and 5 per cents. to be sold and to be converted into 3 per cents. upon this ground; that, however likely or not, that they may be redeemed, the court looks at them as a fund, that is not permanent, though it may remain forever; and considers, that from that quality there is an advantage to the present holder; who gets more interest, because they are liable to be redeemed. I do not know, whether the reasoning is as just in practice as it is in theory. Property cannot be laid out by this court in bank stock, in the execution of a trust to lay it out in government security; for it is not a government security. Converting that therefore the executors would have done what this court would have ordered; and that falls under the same consideration; and

the advantage, if any, ought not to accrue to the tenant for life. The account, therefore, must go as to that as well as the long and short annuities, from the time, at which it would have been converted, if the observation of the court had been drawn to the fact, that the executors were possessed of these funds.

This petition of re-hearing is therefore well founded.³²

HUGHES v. EMPSON.

(In Chancery, before Sir John Romilly, Master of the Rolls, 1856. 22 Beav. 181.)

The testator gave his residue to his two executors, upon trust, after converting the same into money, to lay out and invest the same in or upon government or real securities, or upon railway bonds or debentures in England, and hold the same on trust for the plaintiff.

The testator died the 20th of September, 1853. Part of his estate consisted of seventy-five original Crystal Palace shares, which the executors retained.

By the decree, an inquiry was directed, under what circumstances the defendant had retained the shares, and whether any and what loss had been occasioned thereby.

³² Powell v. Cleaver, 7 Ves. Jr. 142, note 3 (1788); Cranch v. Cranch, 7 Ves. Jr. 141, note 2 (1797); Fearn v. Young, 9 Ves. Jr. 549 (1803); Dimes v. Scott, 4 Russ. 195 (1828); Mills v. Mills, 7 Sim. 501 (1835); Lichfield v. Baker, 2 Beav. 481 (1840); 13 Beav. 447 (1840); Benn v. Dixon, 10 Sim. 636 (1840); Taylor v. Clark, 1 Hare, 161 (1841); Caldecott v. Caldecott, 1 Y. & Coll. N. R. 312 (1842); Sutherland v. Cooke, 1 Coll. 498 (1844); Wrey v. Smith, 14 Sim. 202 (1844); Mackie v. Mackie, 5 Hare, 70 (1845); Sparling v. Parker, 9 Beav. 524 (1846); Johnson v. Johnson, 2 Coll. 441 (1846); Pickup v. Atkinson, 4 Hare, 624 (1846); Hubbard v. Young, 10 Beav. 203 (1847); Kirkman v. Booth, 11 Beav. 273 (1848); Morgan v. Morgan, 14 Beav. 72 (1851); Thornton v. Ellis, 15 Beav. 193 (1852); Blann v. Bell, 5 De G. & Sm. 658 (1852); 2 De G. M. & G. 775 (1852); Meyer v. Simonsen, 5 De G. & Sm. 723 (1852); Murton v. Markby, 18 Beav. 196 (1854); Hood v. Clapham, 19 Beav. 90 (1854); Johnstone v. Moore, 27 L. J. Ch. 453 (1858); Craig v. Wheeler, 29 L. J. Ch. 374 (1860); In re Llewellyn's Trust, 29 Beav. 171 (1861); Hume v. Richardson, 4 De G., F. & J. 29 (1862); Green v. Britten, 1 De G., J. & S. 649 (1863); Allhusen v. Whittell, L. R. 4 Eq. 295 (1867); Pidgeon v. Spencer, 16 L. T. R. 83 (1867); Brown v. Gellatly, L. R. 2 Ch. Ap. Cas. 751 (1867); In re Shaw's Trusts, L. R. 12 Eq. 124 (1871); Tickner v. Old, L. R. 18 Eq. 422 (1874); Porter v. Baddely, L. R. 5 Ch. Div. 542 (1877); MacDonal v. Irvine, L. R. 8 Ch. Div. 101 (1878); In re Smith's Estate, 48 L. J. Ch. 205 (1879); In re Hill, 50 L. J. Ch. 551 (1881); Brannock v. Stocker, Adm'r, 76 Ind. 558 (1881); Kinmonth v. Brigham, 5 Allen (Mass.) 270 (1862); Minot v. Thompson, 106 Mass. 583 (1871); Westcott v. Nickerson, 120 Mass. 410 (1876); Hemenway v. Hemenway, 134 Mass. 446 (1883); Mudge v. Parker, 139 Mass. 153, 29 N. E. 543 (1885); Edwards v. Edwards, 183 Mass. 581, 67 N. E. 658 (1903); Ashhurst v. Potter, 29 N. J. Eq. 625 (1878); Covenhoven v. Shuler, 2 Paige (N. Y.) 122, 21 Am. Dec. 73 (1830); Williamson v. Williamson, 6 Paige (N. Y.) 298 (1837); Cairns v. Chaubert, 9 Paige (N. Y.) 160 (1841); Emmons v. Cairns, 2 Sandf. Ch. (N. Y.) 369 (1845); Spear v. Tinkham, 2 Barb. Ch. (N. Y.) 211 (1847); Smith v. Barham, 17 N. C. 420, 25 Am. Dec. 721 (1833); Jones v. Simmons, 42 N. C. 178 (1851); Saunders v. Haughton, 43 N. C. 217, 57 Am. Dec. 581 (1852).

The chief clerk, by his certificate, found the average price of the shares between the 21st of October, 1853 (when the will of the testator was proved by the defendant), and the 22d of December, 1853 (being two months after), and deducting therefrom the price of the shares on the 14th of November, 1855 (the date of his certificate), he found that there had been a loss of £325., with which he charged the executor.

The executor objected to the finding, and his objections now came on for argument.

Mr. R. Palmer and Mr. Selwyn, for the executor, contended, that the executor ought not to have been charged with the price of the shares at the end of two months, but at the end of twelve months, when their value had considerably diminished, and that no rule existed which required the conversion at the end of two months.

Mr. Lloyd and Mr. W. W. Cooper, for the plaintiff, argued, that some period must be fixed for calculating the loss, which had occurred by the executor allowing the assets to remain on an unauthorized security, and that two months was a reasonable time within which the executor ought to have converted the Crystal Palace shares.

Buxton v. Buxton [1 Myl. & Cr. 80]; Bate v. Hooper, [5 De G., M. & G. 338]; Morgan v. Morgan [14 Beav. 72]; Knott v. Contee [16 Beav. 77], were cited.

The Master of the Rolls, though he now seemed to think that the certificate was correct, mentioned the case on a subsequent day.

THE MASTER OF THE ROLLS. I was desirous to reconsider what I had done in this case on a motion to vary the certificate, and though I concurred in the general effect of it, yet I think I was too hasty on the subject at the time, and I propose to vary it. The question is this: The executors found a portion of the testator's property invested in Crystal Palace shares. It was clearly their duty to sell and invest the produce, and not having done so, they are liable for the loss which has occurred by their omission, and that is what I intended to determine on the former occasion. But then the question is, at what time is the loss to be ascertained? Because the price varied considerably between the death and the sale. I said that two months was a reasonable time for that purpose, but it was contended that a year was the time which has always been given, and that such was the period allowed in Bate v. Hooper; but that case does not govern me on this occasion; there must necessarily be a discretion, and I concur with the argument of Mr. Lloyd, that there is no fixed period, and that it is impossible to say that it is one year. You cannot fix one period for selling every species of property. Thus suppose the testator possessed a large quantity of horses, it would be culpable to keep them, at a great expense, incurring necessarily a great outlay for their maintenance, instead of selling them at once. But with respect to other property, there must be a reasonable time allowed for selling it.

With respect to these shares this was their situation: The institution had not opened, and they paid no dividend, but they bore a premium in the market, and in the view I take of the case, I should have considered it prudent to sell at the earliest period; but in all these cases, a large discretion is allowed to the executors. In *Buxton v. Buxton* [1 Myl. & Cr. 80], Lord Cottenham held, that where an executor had not sold Mexican bonds until a year and a half after the death, and had bona fide kept them, he ought not to be charged with the loss. In this state of things, I consider that the executor may properly exercise a reasonable discretion, and I cannot fix any particular period. I think, in my own view, that two months would have been reasonable time, but he might fairly have considered twelve months. I shall, therefore, only charge him with the loss which would have occurred if he had sold them at the end of twelve months. I have considered whether I could lay down any general rule, but find it impossible. The question depends on the particular nature of the property and the evidence affecting it. I shall, therefore, alter the certificate and charge the executor with the value of the shares at the end of twelve months.³³

LICHFIELD v. BAKER.

(In Chancery, before Lord Langdale, Master of the Rolls, 1840. 2 Beav. 481.)

THE MASTER OF THE ROLLS.³⁴ * * * The only point on which I need call on the plaintiff's counsel to reply, is on the extent of relief now to be granted. As to the other question, I take this to be the rule of the court, that when a testator has given an estate, or the residue of an estate, to persons in succession, as to one for life, with remainder to another person; the court, presuming that the testator intended the remainderman should have something, will so deal with the property, if it be property that is wearing out and may terminate during the life estate, as to secure the accomplishment of that intent, and give the remainderman something; for that purpose it will convert the perishable into a permanent property, and give the income which arises from it to the persons entitled for life in succession, and pre-

³³ In *Grayburn v. Clarkson*, L. R. 3 Ch. App. Cas. 605 (1868), at page 606, Sir W. Page Wood, L. J., said: "The result of the authorities seems to be, that there is no fixed rule that conversion must take place by the end of the year, but that that is the prima facie rule, and that executors who do not convert by that time must show some reason why they did not do so."

For unreasonable delay in conversion trustees were held liable for loss in the following cases: *Bate v. Hooper*, 5 De G., M. & G. 338 (1855); *Grayburn v. Clarkson*, L. R. 3 Ch. App. Cas. 605 (1868); *Sculthorpe v. Tipper*, L. R. 13 Eq. 232 (1871); *Earl of Gainsborough v. Watcombe Terra Cotta Clay Co.*, 54 L. J. Ch. 991 (1885); *Hiddingh Heirs v. Denysen*, 12 Ap. Cas. 624 (1887). Delay to convert for more than a year was held excusable in *Buxton v. Buxton*, 1 Myl. & Cr. 80 (1835), and *Marsden v. Kent*, L. R. 5 Ch. Div. 598 (1877).

³⁴ The statement of facts is omitted and only a part of the case is given.

serve the capital for the person entitled in remainder. That is the rule; and the court only acts upon the general intention of the testator, that something should be given to the person who is the donee in remainder; but if, upon the construction of the will, it appears the testator had another intention, that is to say, an intention to give to one or more persons who are to take for lives or during a succession of lives, the enjoyment of the property in the state he left it at the time of his death, then the court will carry that intention into effect; and every one of the cases which have been cited, and every case which can arise, will turn upon this question of construction, whether you can find upon the face of the will, an intention that the legatee for life shall enjoy the property in the way in which it stood at the testator's death, even to the extent of defeating the testator's intention to bequeath something to the remainderman. I believe that in all the cases which have been cited in opposition to the conversion, there have been words clearly indicating, from the testator's description of the property or some other circumstance, that the testator intended the donee to enjoy it for life, in the same way in which it stood at his death.

Having attended to this will and read it carefully over, and having attended to the ingenious argument by which it has been attempted to be shown that the intention was that the donee for life was to enjoy it as it stood, I think that there is not enough in the will to except this case from the general rule.³⁵ * * *

ABBY M. KINMONTH v. WILLIAM BRIGHAM and Another.

(Supreme Judicial Court of Massachusetts, 1862. 5 Allen, 270.)

HOAR, J. This is a bill in equity by which the widow of David M. Kinmonth seeks to enforce against the executors and trustees of her deceased husband a trust created by his will.

The material facts presented by the bill and answers are these. The testator, who died February 22, 1860, by his will, after certain specific

³⁵ In the following cases the intention of the creator of the trust was held to exclude conversion, under the rule in *Howe v. Earl of Dartmouth*: *Vincent v. Newcombe*, 1 Younge, 599 (1832); *Alcock v. Sloper*, 2 Myl. & K. 699 (1833); *Collins v. Collins*, 2 Myl. & K. 703 (1833); *Bethune v. Kennedy*, 1 Myl. & Cr. 114 (1835); *Pickering v. Pickering*, 2 Beav. 31 (1839), affirmed 4 Myl. & Cr. 289 (1839); *Goodenough v. Tremamondo*, 2 Beav. 512 (1840); *Vaughan v. Buck*, 1 Phillips, 75 (1841); *Hinves v. Hinves*, 3 Hare, 609 (1844); *Cafe v. Bent*, 5 Hare, 24 (1845); *Mackie v. Mackie*, 5 Hare, 70 (1845); *Neville v. Fortescue*, 16 Sim. 333 (1848); *Blann v. Bell*, 16 Jur. 1081 (1852); *Harris v. Poyner*, 1 Drew. 174 (1852); *Crowe v. Crisford*, 17 Beav. 507 (1853); *Hind v. Selby*, 22 Beav. 373 (1856); *Wearing v. Wearing*, 23 Beav. 99 (1856); *Skirving v. Williams*, 24 Beav. 275 (1857); *Holgate v. Jennings*, 24 Beav. 623 (1857); *Simpson v. Lester*, 4 Jur. N. S. 1269 (1859); *Boys v. Boys*, 28 Beav. 437 (1860); *Gray v. Siggers*, L. R. 15 Ch. Div. 74 (1880); *In re Pitcairn*, L. R. (1896) 2 Ch. 199 (1895); *In re Nicholson*, L. R. (1909) 2 Ch. 111 (declining to follow *Porter v. Baddely*, L. R. 5 Ch. Div. 542).

legacies therein set forth, bequeathed the whole residue of his estate to trustees, in trust to invest the same carefully, and to keep the same safely invested, and as often as once in each year, to divide the net income thereof into three parts, one of which they should pay over to his wife, during her natural life. The same persons were named as executors and trustees.

A part of his estate was his interest in a limited partnership, which was formed September 4, 1858, to continue for four years; and to which he had contributed \$50,000, as special partner. By the articles of partnership he was to be entitled to one-half of the profits, and might withdraw the same semi-annually; he was to bear one-half the losses, to the extent of his capital invested, and make good the same semi-annually; and at the end of the term the general partners were to take the stock, fixtures and good-will, and to pay over to him the capital which he had contributed, and the net profits then due. It was also provided that if either of the general partners should violate any of the partnership covenants; the testator and his representatives should have the right to dissolve it, and take possession of the stock, stand, property, and business, and carry on the business on his or their own account; and that in case of the death of either of the general partners within two years, the partnership should continue till the time of the next semi-annual accounting, and the testator and his representatives should then have the same right to take the property and business. By the will, the executors were authorized not to avail themselves of this last provision, unless they should see fit.

The business had been established and carried on by the testator, previous to the formation of the special partnership. The special partnership has proved extremely profitable, the testator having received a large sum as profits before his death; and the executors have received, as profits and capital, \$158,558.44 since their appointment.

The plaintiff seeks to compel the executors to distribute the sum of \$108,558.44, as the net income of the estate.

The case has been most ably and thoroughly discussed by the counsel for the respective parties, upon principle and authority; and it will be sufficient to state briefly the result at which we have arrived.

The English rule is perfectly well settled, that where the residue of personal property is left without specific description, and is given in succession to a tenant for life and remainderman, it shall be invested in a permanent fund, so that the successive takers shall enjoy it in the same condition, and with the same productive capacity. The reason of the rule is the obvious and just consideration, that the intention of the testator is expressly declared to give the enjoyment of the same fund to the successive takers; and that this can only be done by fixing the value of the fund at the time when the right of the first taker to its use commences. The leading case is *Howe v. Dartmouth*, 7 Ves. 137. This was followed by *Fearns v. Young*, 9 Ves. 549, where the doctrine was applied to the case of money invested in a partner-

ship at the death of the testator. Many of the subsequent cases are collected and reviewed in 2 White & Tudor's Lead. Cas. in Equity (Am. Ed.) 278 et seq., in the notes to *Howe v. Dartmouth*, and these, with others, have been carefully presented in the argument of this cause.

In the application of this rule, the English Courts of Chancery, by a long course of decisions, have determined that an investment in the three per cents. is to be generally regarded as the only investment which will be sanctioned or directed by the court as safe and permanent; though, in a few cases, a reference has been made to a Master to find whether an existing security at a higher rate of interest is not absolutely safe, and more beneficial to all the parties. *Caldecott v. Caldecott*, 1 Y. & Coll. 312, 737.

But wherever property is specifically bequeathed, or where the intention can be gathered from the whole will that it should be enjoyed in specie, the rule does not apply.

And the rule itself, so far as it requires an investment in public securities, has never been adopted in this Commonwealth. As was said by Chief Justice Shaw, in *Lovell v. Minot*, 20 Pick. 119, 32 Am. Dec. 206, "there are no public securities in this country, which would answer these requisitions of an English Court of Equity." The only rule which has been recognized by this court as obligatory upon a trustee in making investments is, that he shall act with good faith, and in the exercise of a sound discretion.

In *Lovell v. Minot*, an investment by a guardian in the promissory note of a person in good credit, secured by a pledge of stock in a manufacturing company which was then selling in the market at above its par value, at the rate of about three-quarters of its par value, was held to be made with sound discretion.

In *Harvard College v. Amory*, 9 Pick. 446, an investment was made by trustees under a will, of a fund, the profits and income of which were to be paid to the testator's widow for her life, and after her decease the fund to be distributed. It was held that the trustees were authorized to invest in the capital stock of an incorporated manufacturing company, and of an incorporated insurance company; and that the actual profits and dividends received from such investment were rightly paid to the widow. The will itself expressly empowered the trustees to invest the fund "in safe and productive stock, either in the public funds, bank shares or other stock, according to their best judgment and discretion;" and enjoined attention "in the choice of funds, and in the punctual collection of the dividends, interest and profits thereof." A large part of the testator's property consisted of manufacturing and insurance stock.

But although in this Commonwealth there are no investments regarded as so absolutely secure as to make a choice of them obligatory upon trustees, and in all cases a considerable latitude is allowed, yet it has never been held that trustees for successive takers were at

liberty to disregard the security of the capital in order to increase the income. Nor where property is of a wasting nature, is an investment in it consistent with their duty, in the absence of specific directions in the creation of the trust. They are equally bound to preserve the capital of the fund for the benefit of the remainderman, and to secure the usual rate of income upon safe investments for the tenant for life; and to use a sound discretion in reference to each of those objects. If there is no specific direction, and they are charged merely with the general duty to invest, they cannot postpone the yielding of income for the increase of the capital, nor select a wasting or hazardous investment for the sake of greater present profit. And the rule is the same in regard to property which comes to the trustees from the testator, not specifically bequeathed, as it is in regard to making new investments. If the investment is not such as this court would sustain them in making, it should not be allowed to continue, but should be converted. Its value as a fund should be ascertained as of the time when the enjoyment of the income of it is to commence; and the fund treated as if it had been at that time converted into such an investment as the court would sanction. In determining this value, it is not always practicable to settle it with exactness, until the conversion is actually made; especially in cases where the capital is more or less at risk. The most just rule seems to be, where reasonable care and prudence have been used by the trustees in making the conversion, to treat the whole sums received from time to time, until converted, as parts of the estate; and to find what sum at the time to which the conversion has reference would be equivalent to the amount actually received, at the time it was received; and to treat that sum as capital, and the remainder as income. Thus if the residue consisted of notes or obligations payable at a future day, without interest; and the tenant for life were entitled to the income from the death of the testator; when the money was received, so much of it only would be treated as capital, as, if invested at the death of the testator, would have produced the whole amount at the time the notes or obligations were payable; and the rest would be income. If the property were embarked in a commercial adventure, or were in the shape of a bottomry bond, or other hazardous condition, the trustees would be required to use suitable skill and caution in collecting whatever could be obtained from it, and the value of whatever was or ought to have been realized from it would be fixed as of the time of the testator's death, and treated as capital. And on the other hand, where the property is of a wasting nature, as terminable annuities, leases or the like, the value of the whole investment at the testator's death should be ascertained, and what should be regarded as income be computed upon that basis.

In applying the principles which we have stated to the case at bar, it is conceded that the income to which the plaintiff is entitled should commence and be computed from the death of her husband. We are

of opinion there is nothing in the will which indicates an intention that she should enjoy the income of any particular property which the testator possessed, in specie, but the whole residue was to be alike subject to investment by the trustees. The reference to the special partnership is only in connection with instructions to the executors as to their duty in a certain contingency. In the next place, we cannot regard the investment by a special partner in a trading partnership as such an investment as the court would sanction. It is obviously difficult, in this case, to determine what was the value of the investment at the testator's decease, by any other mode than a computation based upon the whole product ultimately realized from it. It included not merely the fifty thousand dollars contributed by the testator to the enterprise, but the interest in an established and lucrative business, with the right to the services, for a fixed period, of all the general partners. The whole was at risk until the partnership concerns were all settled. It somewhat resembles property invested in a ship, or upon a whaling voyage, or long commercial adventure; from which returns are received from time to time, but with liability to losses which may require the whole to be refunded; and where the successful progress of the enterprise so far may have enhanced the value of the property far beyond its original cost. We think such returns could not be justly treated, between tenant for life and remainderman, as the income of an investment.

We think, therefore, that upon a just construction of the will, equity will regard that the profits received by the executors from the special partnership should not be regarded or treated exclusively as income, but that they should be treated, when received from time to time, as property belonging to the estate, a part of which is to be invested as capital, and a part distributed as income; which parts are to be ascertained by finding what sum, if received at the death of the testator, would amount with interest at six per cent., and making annual rests, to the sum actually received, at the time it was received; and that the sum so found should be invested as principal, and the remainder distributed as income.

The costs of the litigation are to be paid from the whole fund. Decree accordingly.

DIMES v. SCOTT.

(In Chancery, before Lord Chancellor Lyndhurst, 1827. 4 Russell, 195.)

Captain Piercy, by his will, dated the 24th of September, 1801, bequeathed all his ready money, securities for money, and all other his personal estate and effects not thereinbefore specifically disposed of, unto John Atkins and John Corderoy, upon trust to convert the same into money, and thereout to pay his debts and funeral and testamentary expenses, and to stand possessed of, and interested in, the residue of

the money to arise and be produced by his estate and effects, in trust, to place out or invest the same in or upon government or real securities, as to his trustees should seem meet, and to stand possessed of and interested in the money so to be invested or placed out at interest, upon trust, after paying certain annuities, to pay the interest, dividends, and annual produce to his wife Mary, during her life; and, after her decease, to stand possessed of the principal, in the events which happened, in trust for Elizabeth Wintersgill, her executors, administrators and assigns; and he appointed Atkins, Corderoy, and his wife Mary, executors of his will.

The testator died on the 30th of January, 1802; and, shortly afterwards, his widow and Corderoy proved the will.

Part of Captain Piercy's property, at the time of his death, consisted of a sum of £2,000., which, when in Calcutta in 1799, he had invested in a fund of the East India Company, called the Decennial Loan. That loan was irredeemable for ten years from the 1st of January, 1800; it bore interest at the rate of £10. per cent., payable annually either in cash at Calcutta or by bills drawn upon the directors in London, and payable fifteen months after date. The principal was to be repaid at the end of ten years; a power, however, being reserved to the company of postponing the payment for one or two years longer, upon paying, during such additional period, interest at either £10. per cent. or £5. per cent., according as the payment was to be made in India or in London. The shares in the loan were transferrable.

Captain Piercy, before he left India, directed the interest on his portion of the loan to be paid to him in London.

The £2,000., invested in this loan, remained upon that security till 1813, when the principal was paid off and laid out in the purchase of £3. per cent. stock. Corderoy, as executor and trustee, had, during all this time, received the interest, and paid it over to the widow, who had intermarried with a Mr. Scott.

In June, 1820, Elizabeth Wintersgill, and her husband, filed their bill against the executors of Corderoy, and the widow of the testator for an account of his assets. The bill charged, that "the testator's interest in the decennial loan ought, as being a beneficial property, to have been sold, or otherwise the interest ought to have been invested as principal money for the benefit of the testator's estate; and that Mary Scott and Richard Scott, or the personal representatives of Corderoy, ought to be charged with the interest received by Corderoy and Mary Scott in respect of the said loan."

At the hearing, the common accounts were directed. The Master in his report allowed to the executors of Corderoy the payments of the interest on the decennial loan, which Corderoy had made to Mrs. Scott, the tenant for life of the residue.

The plaintiffs excepted to this part of the report, on the ground

that "Mary Scott, being only tenant for life of the residue, was not entitled to be paid the interest upon the subscription of £2,000. to the decennial loan, to the prejudice of the plaintiff, who was the person entitled to the residue immediately after the death of Mary Scott; but that the interest upon the said subscription ought, as it became due and was received by Corderoy, to have been considered and treated by him as part of the general residue of the testator's personal estate, and, as such, during the life of Mary Scott, and the interest thereof, when so laid out and invested, paid to her during her life."

Mr. Barber, in support of the exceptions.

The decisions pronounced, and doctrines laid down by Lord Eldon, in *Gibson v. Bott* [7 Ves. 89], *Howe v. Earl of Dartmouth* [7 Ves. 137], and *Fearn v. Young* [9 Ves. 549], establish the rule, that, where a general residue of personal property is given to one person for life, with remainder over to others, that residue is to be considered as converted into 3 per cent. stock so soon as it could have been so converted, and the tenant for life is to take, not the annual profit which it has yielded in its unconverted state, but the dividends which would have arisen from it, if the conversion had taken place.

Mr. Pemberton, contra.

The present case has no resemblance to any of the authorities which have been cited; leaseholds and long annuities are a perishing fund; they are yearly diminishing in value; every annual payment consists partly of what is truly a payment of interest, and partly also of what is a repayment of capital. Here the principal was not sustaining any diminution.

Lord GIFFORD, Master of the Rolls, held that these payments to the tenant for life were an improper application of the trust moneys.

The order made was as follows: "His Lordship held the plaintiff's said exception to be good and sufficient, and doth therefore order the same to stand and be allowed; and his Lordship doth order that the said Master do review his said report, as to the said decennial loan. And his Lordship doth declare, that the testator John Wintersgill Piercy's subscription of £2,000. to the decennial loan, raised at Calcutta, ought to have been sold upon the decease of the testator; and it is ordered that it be referred to the said Master to inquire what sum the said £2,000., subscribed by the testator to the decennial loan, would have sold for one year after the testator's death, and what sum of bank £3. per cent. annuities the money, which the said Master shall find the said £2,000. subscribed to the said decennial loan would have sold for would have purchased, if the same had been sold by John Corderoy, the executor of said testator, one year after the said testator's death; and it is ordered that the said Master do inquire, how much would have arisen from dividends of such bank £3. per cent. annuities, in case the same had been purchased as aforesaid, to the time the said testator's subscription to the said decennial loan was paid off; and his Lordship doth declare, that the defendants, Thomas

James, John Stanbank, and William Green, the executors of John Corderoy, the executor of the testator, are entitled to be allowed such sum as the Master shall find would have arisen from dividends of the said bank £3. per cent. annuities, as payments on account."

On appeal by the representatives of Corderoy the said order was affirmed.

THE LORD CHANCELLOR.³⁶ This testator left his property to trustees, who were directed to convert it into money, and to invest the proceeds in government or real securities; and he gave the interest of the money so to be invested to his widow for life, with remainder to the lady who is one of the present plaintiffs. Part of his property consisted of a sum which he had subscribed to what is called a decennial loan. The trustees did not convert his share of the loan into money; but, suffering it to remain as they found it, paid the interest, which was £10. per cent., to the tenant for life. Was that a proper performance of their duty?

The directions of the will were most distinct; and, according to the case of *Howe v. Lord Dartmouth* [7 Ves. 137], and the principles of this court, it was the duty of the trustees to have sold the property within the usual period after the testator's death. If they neglected to sell it, still, so far as regarded the tenant for life, the property was to be considered as if it had been duly converted. Had the conversion taken place, and the proceeds been invested in that which is considered in this court as the fit and proper security, namely, £3. per cent. stock, the tenant for life would not have been entitled to more than the interest which would have resulted from such stock. The executor is therefore chargeable with the difference between the interest which the fund, if so converted, would have yielded, and the £10. per cent. which was actually produced by the fund, and was paid over by him to the tenant for life. * * *

I think, therefore, that the judgment of the Master of the Rolls must be affirmed.

Mr. Sugden submitted that the tenant for life was entitled to the actual interest produced by the investment in the decennial loan till the time when it was the duty of the executors to have converted it, namely, till the end of the first year from the testator's death, and therefore that the executors ought to be allowed in their accounts, the extra interest received in respect of that year.

Mr. Horne admitted that, according to the principle of *Angerstein v. Martin* [1 Turn. & Russ. 232], and *Hewitt v. Morris* [1 Turn. & Russ. 241], the tenant for life was entitled to the income of the residue, not merely from the end of the first year after the testator's death, but from the time of his death. The income, however, during the first year was to be measured in the same way as during any subsequent year, and could therefore amount only, so far as the share in

³⁶The opinion of the Master of the Rolls is omitted, and only a part of the Lord Chancellor's opinion is given.

the decennial loan was concerned, to the dividends on the £3. per cent. stock, which, at the end of a year from the testator's death, might have been purchased with the proceeds of that share.

THE LORD CHANCELLOR. During the first year after the testator's death the tenant for life is entitled, not to the interest on the decennial loan, but to the dividends on so much £3. per cent. stock as would have been produced by the conversion of the property at the end of that year.³⁷

BROWN v. GELLATLY.

(In the Court of Appeal, 1867. *Law Reports 2 Chancery Appeal Cases*, 751.)

Duncan Dunbar died March 6th, 1862, testate. By his will, executed July 13th, 1859, he left all his property, personal or freehold, in trust to William Smith Brown and Edward Gellatly; giving them full power, except as thereafter provided, to realize the same when and in such manner as they might see fit, without being personally responsible for such realization, and "to sail my ships for the benefit of my estate until they can be satisfactorily sold, without being responsible for any loss on any voyage."

He made some specific gifts and gave a number of pecuniary legacies upon trust. His residuary estate he gave in trust to tenants for life, with remainders over. He appointed William Smith Brown and Edward Gellatly executors, and gave them "full power to invest at their discretion, or allow to remain as at present invested, all my funds in government and colonial government securities, guaranteed railway stock and debentures, East India bonds and stock, marine insurance shares, and shares in the London Chartered Bank."

At his death, the testator was carrying on business on a large scale as a ship owner and merchant. The ships which he owned at his death were nearly all of them out on voyages. The rest sailed after his death. The result was a large profit.

He possessed a large amount of such stocks, shares, and securities, as were mentioned in the last clause of his will. These, to a considerable extent, remained unconverted. He also possessed a large amount of stocks, shares and securities, not coming under any of those descriptions, and not being proper investments for trust moneys. These also, to a great extent, remained unconverted.

In a suit to administer the trusts of the will, questions had arisen between the tenants for life of shares of the residue and the persons entitled in remainder. A summons, having been taken out to take the

³⁷ See, also, *Taylor v. Clark*, 1 Hare, 161 (1841); *Morgan v. Morgan*, 14 Beav. 72 (1851); *Holgate v. Jennings*, 24 Beav. 623 (1857); *In re Llewellyn's Trust*, 29 Beav. 171 (1861); *Hume v. Richardson*, 4 De G., F. & J. 29 (1862); *Allhusen v. Whittell*, L. R. 4 Eq. 295 (1867); *Brown v. Gellatly*, L. R. 2 Ch. App. Cas. 751 (1867).

opinion of the Master of the Rolls, he made an order declaring his opinion and from that order the tenants for life appealed.

LORD CAIRNS, L. J. There are three questions in the case; the first, as to the ships; the second, as to what I will term the authorized securities; and the third, as to the securities which are not authorized by the will.

With regard to the ships, I think that the case of *Green v. Britten* [1 De G., J. & S. 649] does not apply. In *Green v. Britten* there was an absolute prohibition against converting the ships for seven years, except in an event which did not happen, and the court, resting upon the prohibition, held that it was a sufficient warrant for giving to the tenant for life the income which those ships earned during the seven years. It is not necessary here to consider whether that was a correct construction or not; it is enough to say that the principle on which the court proceeded does not apply to the present case, in which we find no indication whatever of an intention that the ships were to remain unconverted for any specific time. The testator, who had been engaged in the shipping business, knew perfectly well, and shows that he knew, that some time would necessarily be taken in converting the ships, and therefore he very wisely provided that until they were sold the executors should have a power which otherwise they would not have possessed, namely, the power to sail the ships for the purpose of making profit, but in giving that power, he does not give it as a power to be exercised for the benefit of the tenant for life as against the parties in remainder, or for the benefit of the parties in remainder as against the interest of the tenant for life, but says that it is to be exercised for the benefit of the estate, meaning, as I apprehend, for the benefit of the estate generally, without disarranging the equities between the successive takers.

I think, therefore, that with regard to the ships, the testator put them simply in the position of property which was to be converted cautiously, and in proper time, and as to which there was to be no breach of trust in the executors delaying to convert it, but which, when converted, was to be invested, and when invested, to be enjoyed as the residue of his estate.

In that state of things, it seems to me that the case falls exactly within the third division pointed out by Sir James Parker in the case of *Meyer v. Simonsen* [5 De G. & Sm. 723], and that a value must be set upon the ships as at the death of the testator, and the tenant for life must have 4 per cent. on such value, and the residue of the profits must of course be invested, and become part of the estate.³⁸

Then, secondly, as to the authorized securities. By those, I mean the securities which are specified in the last clause of the will, gov-

³⁸ See, also, *In re Thomas*, L. R. (1891) 3 Ch. 482, 486; *In re Woods*, L. R. (1904) 2 Ch. 4; *In re Chaytor*, L. R. (1905) 1 Ch. 233 (1904). The interest now allowed in England under such circumstances is not 4 per cent., but 3 per cent. See the last two cases.

ernment and colonial government securities, guaranteed railway stock and debentures, marine insurance shares, and shares in the London Chartered Bank. The first thirteen items in the list of securities contained in the statement submitted to the Master of the Rolls, are admitted to come under one or the other of those descriptions. In my opinion, according to the construction of the will, the executors have full power to retain upon those securities, for as long as they think it advantageous, the money invested by the testator in those securities, or to invest upon securities of any of those descriptions the money obtained by the conversion of any part of the testator's estate, and while any such securities form part of the testator's estate the tenant for life is, in my opinion, entitled to the specific income of the securities, just as if they had been £3. per cent. consols. I understand the words of the will as amounting to the constitution by the testator of a larger class of authorized securities than this court itself would have approved of, and the court has merely to follow his directions, and treat the income accordingly, as being the income of authorized securities.

Then comes the third question in the case, the securities not ranging themselves under any of those mentioned in the last clause of the will. They appear to have been securities possessed by the testator himself, but that, I think, makes no difference; as they do not come within the class of authorized securities it was the duty of the trustees to convert them at the earliest moment at which they properly could be converted. I do not mean to say that the trustees were by any means open to censure for not having converted them within the year, but I think that the rights of the parties must be regulated as if they had been so converted. I think the proper order to make is that which was made in *Dimes v. Scott* [4 Russ. 195], followed by Vice-Chancellor Wigram in the case of *Taylor v. Clark* [1 Hare, 161], namely, to treat the tenant for life as entitled, during the year after the testator's death, to the dividends upon so much 3 per cent. stock as would have been produced by the conversion and investment of the property at the end of one year. This will involve a variation of the order under appeal as to those securities, since it proceeds upon a somewhat different footing, and aggregates the amount produced by conversion at the end of the year with the dividends produced during the year, which is not precisely in accordance with *Dimes v. Scott* and *Taylor v. Clark*.

In re STRAUBENZEE.
BOUSTEAD v. COOPER.

(In Chancery, before Lord Justice Cozens-Hardy. 1901. *Law Reports* (1901)
2 Chancery Division, 779.)

By a settlement dated November 13, 1841, and made between General John Luther Richardson of the first part, Miss Charlotte Louisa Richardson of the second part, General Sir Charles Thomas Van

Straubenzee (then Captain Van Straubenzee) of the third part, and certain trustees of the fourth part (on the marriage of Miss Richardson and Captain Van Straubenzee), a sum of £2,000. East India stock, the property of General Richardson, was settled upon trust for the wife for life, and then for the husband for life, with usual trusts for the issue of the marriage; and in the event, which happened, of there not being any child of the marriage, then the trustees were to transfer one moiety to the husband, his executors, administrators and assigns absolutely, and to transfer the other moiety to General Richardson, his executors, administrators and assigns. The settlement contained a covenant by the husband and wife that in case at any time or times thereafter during the coverture any real or personal estate or effects of any kind or quality of estate and effects should come to or vest in the wife, or the husband in his right, at law or in equity, by devise, descent, gift or otherwise, the same should be conveyed, settled and assured from time to time, without any delay by the husband, his executors, and administrators, and the wife, and all persons claiming under her, with the trustees, their heirs, executors, administrators, and assigns respectively, according to the nature or quality of the said property respectively, upon such and the same trusts, and to and for such and the same ends, intents, and purposes, and with, under, and subject to such and the same powers, provisions and limitations, declarations and agreements, as were thereinbefore mentioned, expressed, and declared of and concerning the said sum of £2,000. East India stock, or as near thereto as the nature of the property or other intervening circumstances should permit. The settlement did not contain any power to vary securities.

General Richardson by his will, dated April 13, 1847, and proved in 1849, gave all his residuary personal estate to trustees, upon trust as soon as conveniently might be to sell and convert into money all such parts of his estates and effects as should not consist of money; and to stand possessed of the moneys which should arise from the said sale of the said residuary estate and effects, as to one equal third part in trust for his daughter Mrs. Ellis, for her separate use; as to another equal third part for Lady Van Straubenzee absolutely; and as to the remaining third part in trust for his daughter, Catherine Frances Richardson absolutely.

Lady Van Straubenzee died in 1900, a widow and without issue.

An originating summons was taken out by John Boustead, William Naughtin, and Lindsay Farrington, the then trustees of the settlement of 1841, to which summons the following persons were defendants, namely: J. H. Cooper and D. Hale, the legal personal representatives of the surviving trustee of the settlement; J. F. Rochford, the legal representative of Lady Van Straubenzee, Frances G. M. Naughtin, (wife of W. Naughtin) and T. Van Straubenzee and J. P. Jervoice, who with the plaintiff Farrington were the legal personal representa-

tives of General Van Straubenzee; and A. J. King, the legal personal representative of General Richardson.

As regards one of the questions raised by the summons, Cozens-Hardy, J., held that the one-third share which Lady Straubenzee took in her father's residuary estate was bound by the covenant to settle after-acquired property. This residue included one moiety of the settled property, which, on her death, a widow and without issue, fell to General Richardson's executors.

A further question was then argued, whether the rule in *Howe v. Earl of Dartmouth* [7 Ves. 137] applied.

COZENS-HARDY, J., after stating the facts as above set out, continued as follows: Now, so far as I am aware, the rule in *Howe v. Earl of Dartmouth* [7 Ves. 137] has never been applied except to a disposition by will of residuary personal estate given as one fund to be enjoyed by several persons in succession. The court assumes an intention that the legatees should enjoy the same thing in succession, and, as the only mode of giving effect to such intention, it directs the conversion into permanent authorized investments of all such parts of the residuary estate as are of a wasting or reversionary or unauthorized character. See *Pickering v. Pickering* [4 My. & Cr. 289], and *Macdonald v. Irvine* [8 Ch. Div. 101, 112]. But the rule does not apply to any bequest which is specific, as distinguished from residuary. On principle, I can see no ground for applying the rule to the present case. The covenant to settle after-acquired property is a contract which has to be performed in strict accordance with its terms. It operates upon that which must be regarded as a specific property—namely, the lady's share in her father's estate. This share is to be vested in the trustees upon the same trusts as are declared with reference to the India stock. Those trusts do not include a trust for sale of the India stock, nor is there even a power to sell it, apart from legislation since 1841. I cannot imply a trust to convert that which is brought into the settlement, whether it be real or personal estate. It is remarkable that there is no direct authority on the point. Mr. Vaizey, in his book on *Settlements*, p. 421, says: "There are two cases in which, probably, the rule is applicable to trusts in settlements created by deed. One is that in which the unrealized estate of a deceased person, or of the share in such an estate to which the settlor is entitled, is settled. The other is the case of a covenant to settle after-acquired property." In support of this view no judicial decision is cited, and there are two cases which tend in the opposite direction. In *Milford v. Peile* [17 Beav. 602], which is more fully reported in 2 W. R. 181, the point seems to have arisen. By a settlement made in 1848, on the marriage of Mrs. Milford, a sum of £10,000. consols was held by trustees, upon trust either to retain the same in its then present state of investment, or to sell the same and invest the proceeds in other securities, with power to vary securities, and upon trust to pay the income to the wife and husband during their respective

lives. The settlement contained a joint and several covenant by Mr. and Mrs. Milford that, in case any real and personal estate to the amount of £100. sterling at any time should during the coverture, by gift, devise, bequest or intestacy, from or of her father, Mr. Thames Locke Lewis, come to or devolve on her, then the same real and personal estate should, by such acts, deeds, and assurances as should be necessary for the purpose, be duly vested in the trustees or trustee for the time being of the marriage settlement, their and his heirs, executors, administrators, and assigns, and be held upon and for such trusts, intents and purposes, and with, under and subject to such powers, provisos, and declarations (as far as the nature of the property would admit) as were thereby declared of and concerning the premises thereby assigned and settled by and on the part of the said Frances Harriott Lewis, and the dividends and annual produce thereof, or such and as many of the same as should be subsisting and capable of taking effect. Mr. Lewis, the father, died in November, 1852, having by his will bequeathed a certain leasehold house and premises, and all the furniture and effects therein, to trustees, in trust for Mrs. Milford for her separate use. The bill was filed by Mrs. Milford against her husband and the trustees to take the opinion of the court whether the leasehold house and furniture were bound by the covenant, and, if so, whether they ought to be enjoyed in specie, or be converted into money, and the proceeds invested. The Master of the Rolls (Sir John Romilly) held that the property was bound by the covenant, and was of opinion that there was no trust for conversion in the settlement, and that the property should be assigned to the trustees and enjoyed in specie. *Howe v. Earl of Dartmouth* [7 Ves. 137], does not seem to have been cited, and no clear reasons are given for the conclusion arrived at. The decision, however, was inconsistent with the view that the rule in *Howe v. Earl of Dartmouth* applied, unless Sir John Romilly relied upon the express option given to the trustees either to retain or to sell.

In the following year, 1855, the question arose for consideration before Kindersley, V. C., in *Hope v. Hope*, which is reported only in 1 Jur. (N. S.) 770. By a marriage settlement certain funds were vested in trustees upon trust to pay the interest of one moiety to the wife for her separate use, and upon trust to pay the other moiety to the husband for life, and upon trust after the death of one to pay the interest of the whole to the other, and trusts were declared as to the trust funds after the death of the survivor for the benefit of the children of the marriage; and in the settlement was contained a covenant to settle after-acquired property upon and for the trusts therein-before declared as to the funds vested in the trustees above mentioned; provided always, and it was thereby agreed and declared, that it should be lawful to and for the trustees, at the request in writing of the husband and wife during their joint lives, and of the survivor of them during his or her life, and after the decease of such survivor at the

discretion of the trustees, absolutely to sell and dispose of all or any of the real estate or personal estate (not consisting of money, stocks, funds, or securities) which under the covenants thereinbefore contained should become subject to the trusts thereof in manner therein mentioned; and that the trustees should stand and be possessed of the moneys which should arise from such sale or sales upon the like trusts and subject to the like provisions and agreements as were thereinbefore declared and contained of and concerning the funds vested in trustees as above mentioned. The lady's father by his will gave and bequeathed to her his leasehold house in which he then resided, together with certain chattels. He died in 1851, and the leasehold house, which was held for a term of which twenty-two years was unexpired, was assigned to the trustees of the settlement. A question having arisen as to whether the leasehold house and the specific chattels bequeathed by the will ought to be retained, or ought to be converted into money and the proceeds invested upon the trusts of the settlement or whether they ought to be enjoyed in specie, a special case was submitted to the court. *Howe v. Earl of Dartmouth and Milford v. Peile* were cited. Kindersley, V. C., said he was not aware of any case in which the principle of *Howe v. Earl of Dartmouth* had been applied to a settlement, which was a contract between the parties, whilst in a will there was no contract. But whatever might be the general principle, in this particular case, so far from there being any trust, implied or otherwise, for conversion, conversion was only to take place at the request of the husband and wife during their lives, and after their death at the discretion of the trustee, the intention being that the property, whatever it was, coming to the wife, should be settled. There would, therefore, be a declaration that the property was not to be converted during the lives of the husband and wife without their request. *Hope v. Hope* is important as indicating that in the opinion of the Vice-Chancellor, the rule does not apply to a marriage settlement, but I cannot treat it as a positive decision to that effect. Under these circumstances I feel at liberty to follow my own view. And I therefore hold that the rule in *Howe v. Earl of Dartmouth* has no application to the present case.

In re OLIVER.

WILSON v. OLIVER.

(In Chancery, before Warrington, Justice, 1908. Law Reports (1908) 2 Chancery, 74.)

Originating summons.

Thomas Blossom Oliver, by his will dated September 12, 1905, after bequeathing to his wife Mary, an immediate legacy of £2,000., and all of his household furniture and effects, gave and devised all his real and personal estate unto his trustees upon trust for sale and conver-

sion, and after payment of his debts, funeral and testamentary expenses and the said legacy, upon trust to invest the net residue and pay the income thereof to his wife during her life, and after her death to pay and divide the corpus from which the said income was derived and the investments equally between and amongst all his brothers and sisters in equal shares as tenants in common. The will contained no power to postpone the conversion of the estate.

The testator died on September 13, 1905, possessed of considerable real and personal estate.

Part of the real estate and the whole of the personal estate had been converted and the proceeds applied in payment of the debts, funeral and testamentary expenses, and in or towards the discharge of incumbrances on the unsold real estate, which now constituted the entire estate and had been retained unconverted in the interests of the several beneficiaries.

The present summons was taken out by the trustees of the will for the determination of the question (*inter alia*) whether the plaintiffs as trustees ought to make any, and if any what, payment to the defendant Mary Oliver, by way of income in respect of the real estate of the testator remaining unconverted and on what principle the amount of such payment ought to be calculated.

WARRINGTON, J., read the following judgment:

The question in this case is whether the defendant Mary Oliver, the tenant for life under the testator's will, is entitled to the rents of certain unsold real estate or whether such real estate ought to be valued and interest on such value paid to her. [His Lordship stated the facts, observing that the unsold real estate had been properly retained unconverted in the interests of the several beneficiaries. He continued:] On these facts the question I have stated arises.

In the case of a simple devise of real estate in trust for sale where the proceeds are to be held for several in succession, I think it is settled that until sale the tenant for life is entitled to the rents and profits. *Casamajor v. Strode* [19 Ves. 390, note]; [*Hope v. D'Hédouville*, L. R. (1893) 2 Ch. 361]. On the other hand, in the case of a similar bequest of personal estate, the tenant for life would not be entitled to the income of the estate in specie, so far as it is not derived from authorized investments, but would be entitled to a sum representing interest at a fixed rate on the value.

It has indeed been argued that there is no such distinction between real and personal estate, but that the rule as to personalty is universal in its application, and in support of this argument reliance is placed on a passage in the judgment of Lord Macnaghten in *Wentworth v. Wentworth* [L. R. (1900) A. C. 171]. That passage is as follows: "In this country, in the case of income-producing property directed by will to be converted, but retained for a time unconverted for the benefit of the estate, it has been the practice of the court to put a value on the property, and to allow the tenant for life out of the income

actually produced a sum equal to 4 per cent. on such value. That was the rule laid down by Parker, V. C., in *Meyer v. Simonsen* [5 De G. & Sm. 723], and followed by Lord Cairns in *Brown v. Gellatly* [L. R. 2 Ch. 751].” But the subject-matter of that case was mining property, and the question which the Privy Council had to determine was not whether the tenant for life was entitled to the mining rents in specie—for to them she was, of course, not entitled—but in what manner her interest was to be ascertained. The court below had given her only the income of the mining rents when invested. This the Privy Council thought unfair to her and gave her interest on the value of the estate. What might have been her rights as to the ordinary rents and profits in real estate was not considered, nor was either *Casamajor v. Strode* or *Hope v. D’Hédouville* cited; and I do not think under the circumstances that I can regard the passage I have quoted from *Wentworth v. Wentworth* as overruling the express decisions above mentioned.

But in this case the real and personal estate are devised and bequeathed together, and the proceeds of both are to be held as one fund, and it is contended that in such a case the rules regulating personal estates ought to prevail. Against this contention there are two express decisions of a judge of co-ordinate authority, which are binding on me, unless it can be shown that there are other decisions which are directly in conflict with them, or that they are contrary to some established principle of law. The two decisions I refer to are those in *In re Searle* [L. R. (1900) 2 Ch. 829] and *In re Earl of Darnley* [L. R. (1907) 1 Ch. 159]. In the first of these cases Kekewich, J., after argument reviewed the cases on the subject, and held that there is in law the distinction I have mentioned between realty and personality, and that this distinction exists notwithstanding that they are both comprised in a single trust for conversion. This, therefore, is a case directly in point. In the second case the same learned judge followed his previous decision, and it is of importance only because in it *Wentworth v. Wentworth* was cited. There is no express decision to the contrary, but it is said that there is an established principle that where realty and personality are combined in one fund rules relating to personality will be applied to both constituents of such fund, and that the decisions that I have mentioned are inconsistent with that principle and therefore ought not to be followed. But the answer, I think, is that no such general principle has been established. Reliance is placed on *Genery v. Fitzgerald* [Jac. 468] and *Bellairs v. Bellairs* [L. R. 18 Eq. 510]. The first of these related to intermediate rents of real estate devised so as to vest at a future time, and the second to conditions subsequent in restraint of marriage. In both the effect of applying different rules to the two classes of property would have been to give the beneficial interest in the two classes to different persons though they were comprised in the same gift, and this, I think, is the true ground of decisions of that class.

The strongest expression of opinion in favor of the supposed general principle, is that of Sir George Jessel in *Bellairs v. Bellairs*. He says: "But there is another ground upon which again I am bound by authority. This is a mixed fund; and the proceeds of realty and personalty directed to be converted are thrown together as an entire fund. Now the rules as to mixed funds are very different from the rules governing simple funds, arising from one or the other kind of property. The general rule in modern times has been to govern this mixed fund by the rules of personalty, and in some cases it has been carried so far that even where the only mixture, so to say, was giving the funds to the same objects, that has been carried out. The case of *Genery v. Fitzgerald* is a notable example. That was not the case of a true mixed fund, but a simple gift of realty and personalty to the same object. When we come to true mixed funds we find the law has been largely modified in favor of the rules regulating personal estate, as is shown by the decisions in the well-known cases of *Roberts v. Walker* [1 Russ. & Myl. 752], *Boughton v. Boughton* [1 H. L. C. 406] and *Tench v. Cheese* [6 De G., M. & G. 453]. Therefore, if it depended simply on this consideration, I should be bound to hold that, having a mixed fund, you are not to sever it into two, and say it is valid as to so much as arises from realty, and invalid as to so much as arises from personalty, but to hold that the two funds are to be kept together, and that the rules as to personal estate apply." I think the key to this is to be found in the words, "the two funds are to be kept together," and that the passage was not intended to have the general application contended for. No such general principle as is contended for has, in my opinion, been established. There is no question here of keeping the two funds together, and no difficulty in applying one rule to the rents of realty and another to the income of personalty, any more than there would be in giving the tenant for life income in specie of authorized investments and some conventional sum in lieu of income of unauthorized investments.

On the whole I must follow *In re Searle* and *In re Earl of Darnley* and I declare that Mary Oliver is entitled to the rents of the unsold real estate.³⁹

SARAH E. N. EDWARDS and Another, Trustees, v. HENRY EDWARDS and Others.

(Supreme Judicial Court of Massachusetts, 1903. 183 Mass. 581, 67 N. E. 658.)

Bill in equity, filed March 23, 1903, by the trustees under the will of James Edwards, for instructions as to the application of the pro-

³⁹ *In re Searle*, L. R. (1900) 2 Ch. 829; *In re Earl of Darnley*, L. R. (1907) 1 Ch. 159 (1906). See, also, *Hope v. D'Hédouville*, L. R. (1893) 2 Ch. 361; *Casamajor v. Strode*, 19 Ves. 390, note 11.

ceeds of sale of a certain valuable tract of vacant land on Huntington Avenue in Boston.

The case came on to be heard before Braley, J., who reserved it upon the bill and answer and an agreed statement of facts for the consideration of the full court, such order to be made therein as justice and equity might require.

KNOWLTON, C. J. This is a bill for instructions by trustees appointed under the will of James Edwards. By the will he gave all his property to these trustees, stating the trust as follows: "To invest and reinvest the same at their discretion, in such securities as the laws of this Commonwealth allow Savings Banks to invest their funds in, and the whole net income therefrom shall be paid to my wife as long as she shall live, for her own use and disposal, with the exception that I direct that from said income there shall be paid monthly to my son, William Edwards and his wife, Alice J. Edwards, in equal shares, the sum of one hundred dollars, as long as my said wife shall live." At the death of his wife the trustees are to pay the income to his children and to the wife of one of them, and at the termination of the trust, to pay over the remainder to his grandchildren or to his heirs at law. The value of the personal property that came into the hands of the trustees was nearly \$70,000, and the value of the real estate was more than \$200,000. Much of the personal property, that he left, was stock carried by brokers on margins and the most valuable part of the real estate was unproductive land on Huntington Avenue which was appraised in the executor's inventory, filed November 11, 1896, at \$150,000, and in the trustees' inventory, filed December 31, 1898, at \$155,000, and was sold by the trustees on September 1, 1899, for \$196,500. The question relates to the apportionment of income and principal between the life tenant and the remaindermen, from the proceeds of the sale of the land on Huntington Avenue. It is argued that the value of this land at the time of the testator's death was the sum at which it was appraised in the executor's inventory, and that the trustees used every reasonable effort to sell it, and in view of the improvements in that vicinity, exercised a sound judgment in holding it until the time of the sale. It did not produce sufficient income to pay the taxes and expenses upon it. Under language like that of this will, which gives the trustees all the property, real and personal, and does not indicate an intention that the time for establishing the fund shall be postponed, and which gives to a life tenant the annual income, it is well settled law in this Commonwealth that the income is to be computed from the time of the testator's death. *Sargent v. Sargent*, 103 Mass. 297, 299; *Westcott v. Nickerson*, 120 Mass. 410. In the present case the testator obviously intended that the entire property should be converted into one fund, and that the unproductive and speculative investments which he had at the time of his death should be changed without unreasonable delay. Much of the property held on margins was not of such

a kind "as the laws of this Commonwealth allow Savings Banks to invest their funds in," and the land on Huntington Avenue was not in a condition to be held as a permanent investment. It was, therefore, the duty of the trustees to convert this property into an income-producing fund, and this they did according to their best judgment and discretion. The testator is presumed to have expected that some time would be required to accomplish this. At the same time, he is presumed to have intended that the rights of the life tenant to income should be ascertained on the creation of the fund, as if the fund had come into existence immediately after his death. This is in accordance with the rule repeatedly stated by this court. *Kinmonth v. Brigham*, 5 Allen, 270, 278; *Sargent v. Sargent*, 103 Mass. 297; *Westcott v. Nickerson*, 120 Mass. 410; *Mudge v. Parker*, 139 Mass. 153, 29 N. E. 543. The rule is applicable as well when the delay in converting the property is necessary as when it is caused by the voluntary act or default of the trustees. *Loring v. Massachusetts Horticultural Society*, 171 Mass. 401, 404, 50 N. E. 936. In *Westcott v. Nickerson*, *ubi supra*, Chief Justice Gray says of the property in such cases, "The necessary inference, and the established rule are that it must be invested as a permanent fund, and the value thereof fixed at the time when the right of the first taker begins, that is to say, at the death of the testator." In *Sargent v. Sargent*, *ubi supra*, the same justice says: "The general rule is established, that the tenant for life is entitled to the income of a residue given in trust from the time of the testator's death."

The question raised by this bill for instructions relates only to the proceeds of the sale of the land on Huntington Avenue. The life tenant, the widow of the testator, is one of the trustees who bring the suit, and in the bill she states her claim as follows: "The widow of the testator, who with the annuitants, is entitled to the income of the trust fund from the time of the testator's death to the filing of this bill, claims that she is entitled to receive a proportionate part of the proceeds of the sale of said Huntington Avenue land, as the income of that part of the trust estate, and contends that all the taxes, assessments and brokers' commissions, which the trustees and executors have paid, and are bound to pay, should be charged to the funds received from said sale, and that the fund should then be so divided as to constitute a fund at the time of the testator's death, which, with interest at a reasonable rate, to wit, four per cent., will produce the amount for which the said estate was sold, less the expenses accruing on the same, and all betterments against said premises which the trustees are bound to pay, and that then she is entitled to said interest or income, and that the fund determined as aforesaid shall form a part of the corpus of the estate." The question arises whether, in apportioning the principal and income, we are to assume that the fund, if established at the time of the testator's death, would have earned interest at the rate of six per cent. per annum, or only at some lower

rate. It was said at the argument, and we suppose it to be a fact of common knowledge, that a fund invested in such securities as savings banks may invest in under our laws, cannot be made to produce an income of nearly so much as six per cent. per annum, and the life tenant in stating her claim, suggests the allowance of "interest at a reasonable rate, to wit, four per cent." In this statement she recognizes the principle that in this case we are not to deal with interest as an allowance made by law to represent damages for the failure to pay money when it is due. We are to deal with the income which could have been obtained by the trustees if the fund had been ready for investment and had been invested immediately after the death of the testator. The failure to invest it then was not the fault of anybody, and we are not called upon to allow interest as interest, but only to ascertain the probable income. Whenever interest is to be allowed for the failure to pay money, the law knows no other rate than six per cent. per annum. *Welch v. Adams*, 152 Mass. 74, 25 N. E. 34, 9 L. R. A. 244; *Loring v. Massachusetts Horticultural Society*, 171 Mass. 401, 50 N. E. 936; *Bartlett, Petitioner*, 163 Mass. 509, 521, 40 N. E. 899.

But we are to ascertain as between tenant for life and remaindermen, what part of a gross sum now in hand shall be treated as capital and what part as income, and when we are called upon to find out what sum at an earlier date, if invested by trustees, would have been sufficient to produce, with its income, the gross sum now in hand, we must look to the actual income that can be obtained from investments, and not to the rate of interest established by law.

In *Westcott v. Nickerson*, *ubi supra*, it is said that the amount obtained "is to be distributed between the tenant for life and the remainderman, by computing what sum, if received at the death of the testator, adding interest at six per cent. with annual rests, would produce the amount afterwards actually received * * * and by investing the original sum, so computed, as principal, and distributing the residue as income." In *Kinmonth v. Brigham*, *ubi supra*, a direction is given in similar language. But in neither of these cases was any consideration given to the possible difference between the income actually obtainable and the rate of interest prescribed by law. The first of these cases was decided in 1876 and the other in November, 1862, and at the time to which the decisions relate there was little if any, difference between the actual earnings of capital and the rate of interest established by law. Neither the parties nor the court had any occasion to consider the question now raised.

We are of opinion that the case should be referred to a master to ascertain what sum would have been sufficient if invested by the trustees immediately after the death of the testator, to produce, with the income which they reasonably could have obtained from it, the sum in the hands of the trustees as the net proceeds of the land on

Huntington Avenue, after deducting their disbursements on account of the property. That sum is to be held as principal and the remainder is to be paid over as income.

III. THE TRUSTEE'S DUTY TO INVEST THE TRUST FUNDS.

HARDEN v. PARSONS.

(In Chancery, before Lord Keeper Northington, 1758. 1 Eden, 145.)

John Stokes by his will, bearing date the 6th of August, 1725, gave the sum of £1,000. to be invested in land, and settled to the use of John Stokes and his heirs lawfully begotten, with remainder to Samuel Stokes in the same manner. He appointed John Lyde, Andrew Parsons, John Thomas, Benjamin Milles, and William Thornhill, his executors. By a codicil, bearing date the 25th of August, 1726, he afterwards reduced the sum to £400., and died in 1727. All the executors acted except Milles.

The sum of £1,000. which was due to the testator upon mortgage at his death, having been called in and paid on the 1st of October, 1731, was lent to Lyde, who was a considerable merchant at Bristol, who gave a bond to the other executors, which was deposited with their clerk.

By indenture, bearing date the 29th of March, 1738, reciting the devise under the will and the words of the limitations, the names of the executors, and the codicil verbatim, and that the sum of £400. had not been laid out in lands according to the directions of the said testator, but that the same remained in the hands of the trustees, some or one of them, the said John Stokes assigned his interest in the same to the plaintiff Harden.

Lyde regularly paid the interest upon the bond till 1735, when he paid off the sum of £565., which reduced the principal to £400.; and from that time to his death in 1744, he regularly paid the interest of the £400. to Stokes. Lyde dying insolvent, the present bill was brought to charge the executors with the legacy.

THE LORD KEEPER.⁴⁰ This is a bill brought to have a legacy invested in land, pursuant to the will of John Stokes, which legacy became due in the year 1727, being thirty-one years ago; and it is to have it paid by the executors, the money having been lost by an insolvent security; and the claim of the plaintiff is said to be founded upon two legal principles. 1st., That two executors joining in a receipt are each chargeable pro toto. 2dly, That an executor lending out money on a personal security, is guilty of a breach of trust, and liable to the payment of the money. * * *

⁴⁰ Only a part of the opinion is given.

The next consideration must proceed upon a supposition that the money was received and lent out on an improper security, and that they are guilty of a breach of trust. It is said that they cannot place it out on personal security. It is agreed that there is no text writer that lays down that rule, nor any cases which establish it. If so, we must resort to the inquiry into the nature of the office and duty of a trustee as considered in a court of equity. No man can require, or with reason expect a trustee to manage his property with the same care and discretion that he would his own. Therefore the true touchstone by which such cases are to be tried is, whether the trustee has been guilty of a breach of trust or not. If he has been guilty of a gross negligence, it is as bad in its consequences as fraud, and is a breach of trust. The lending trust money on a note, is not a breach of trust, without other circumstances *crassæ negligentiae*. That is plain from the case of *Ryder v. Bickerston* [3 Sw. 80], where a sum of money was left to be placed out on security, with the best interest that could be got. The executor had lent it on a note without interest. Did the court say that it was a clear breach of trust to lend it on a personal security? No. The court heard counsel, and gave a solemn opinion to show the gross negligence in that particular case; and there was not an intimation that a fair loan of rational credit is, in itself, a breach of trust. But it is said, and Mr. Attorney applies to Mr. Wilbraham, knowing his habitual timidity about money matters, and asks him, whether he would do it? Perhaps not; but other prudent men do.

The confirmation here is most deliberate, uniform, and steady, both in John Stokes, deceased, and in Samuel, the present plaintiff. John Stokes knew of the will and the trusts of it, and recites them in his assignment; all the family had legacies, particularly the remainderman; they consent that the legacy shall continue, by not bringing their bill, or finding a purchase, and applying to the executors to lay out the money in land.⁴¹ Bill dismissed.

⁴¹ See *Hale's Case*, 3 Sw. 63 n. (b.) (1637).

In *Walker v. Symonds*, 3 Sw. 1 (1818), at pages 62, 63, Lord Chancellor Eldon says of the principal case: "The judgment in *Harden v. Parsons* [1 Eden, 145] is, in more respects than one, a curious document in the history of trusts as administered by this court. Lord Northington says: 'The lending trust money on a note is not a breach of trust, without other circumstances *crassæ negligentiae*. That is plain from the case of *Ryder v. Bickerston*, where a sum of money was left to be placed out on security, with the best interest that could be got. The executor had lent it on a note without interest. Did the court say that it was a clear breach of trust to lend it on a personal security? No.' The fact is, that the court said, Yes; declaring that the trustee having placed out the money neither at interest nor on security, had committed a direct breach of trust in both respects. Lord Northington proceeds to state a most material circumstance in the case; a 'deliberate, uniform, and steady confirmation.' The editor of this valuable work has taken the trouble to subjoin a great variety of cases, all of which contradict the doctrine that investing trust money on personal security is not a breach of trust."

HOLMES v. DRING.

(In Chancery, before Sir Lloyd Kenyon, Master of the Rolls, 1788. 2 Cox, Equity Cases, 1.)

The plaintiff (an infant) was entitled to a sum of £300. under a will, which the two defendants, the executors, residing in the country, lent on private security of a bond in which a surety joined, and which was made to both the executors. The obligors were in very ample circumstances at the time the money was lent, but afterwards becoming insolvent, the plaintiff now charged the executors with the money.

Madocks & Mitford for the executors argued, that persons in the country could not so readily invest money in the public funds as those who resided on the spot, and that if they lent so small a sum as this upon such security as might reasonably be considered at the time as ample and unquestionable, and such as a prudent man would lend his own money upon, it would be a hard measure to charge them with any loss that might happen by the unexpected failure of such security. And Madocks mentioned a case in *Gilb. Rep.* 10, to show that the court considered an executor as justifiable in lending trust money on private security, if he took the security of more than one solvent person.

THE MASTER OF THE ROLLS. As to the case in *Gilbert*, it cannot be authority for what is contended for; the bond of several persons cannot be distinguished from the bond of one person, as applied to this case. It was never heard of that a trustee could lend an infant's money on private security. This is a rule that should be rung in the ears of every person who acts in the character of a trustee, for such an act may very probably be done with the best and honestest intention, yet no rule in a court of equity is so well established as this. I must, therefore, direct an account against the executors of this money, and order them to pay it in moieties, with interest at 4 per cent., and I am bound to make them pay the costs of the cause.⁴²

⁴² *Terry v. Terry*, *Prec. in Chy.* 273 (1708); *Gilbert*, *Eq.* 10; *Ryder v. Bickerton*, 3 Sw. 80, note (1743); *Anonymous*, *Lofft*, 492 (1774); *Adye v. Feuilleateau*, 3 Sw. 84, note (1783); 1 Cox, *Eq.* 24; *Keble v. Thompson*, 3 Bro. C. C. 112 (1790); *Wilkes v. Steward*, G. Cooper, 6 (1801); *Pocock v. Redington*, 5 Ves. Jr. 794 (1801); *Vigrass v. Binfield*, 3 Mad. 62 (1818); *Walker v. Symonds*, 3 Sw. 1, 62, 63 (1818); *Clough v. Bond*, 3 Myl. & Cr. 490, 496 (1838); *Darke v. Martyn*, 1 Beav. 525 (1839); *In re Tucker*, L. R. (1894) 2 Ch. 724 (1893); *Perley v. Snow*, *Ritchie*, *Eq. (Nova Scotia)* 373 (1879); *Worts v. Worts*, 18 Ont. 332 (1889); *Barney v. Saunders*, 16 How. 535, 545, 14 L. Ed. 1047 (1853); *Lewis v. Cook*, 18 Ala. 334, 337 (1850); *Moore v. Hamilton*, 4 Fla. 112 (1851); *Brown v. Wright*, 39 Ga. 96 (1869); *State v. Johnson*, 7 Blackf. (Ind.) 529 (1845); *Benson v. Liggett*, 78 Ind. 452 (1881); *Clay v. Clay*, 3 Metc. (Ky.) 548 (1861); *Mattocks v. Moulton*, 84 Me. 545, 552, 24 Atl. 1004 (1892); *Hunt v. Gontrum*, 80 Md. 64, 30 Atl. 620 (1894); *Harding v. Larned*, 4 Allen (Mass.) 426 (1862); *Clark v. Garfield*, 8 Allen (Mass.) 427 (1864); *Judge v. Mathes*, 60 N. H. 433 (1881); *Gray v. Fox*, 1 N. J. Eq. 259, 22 Am. Dec. 508 (1831); *Vreeland v. Vreeland*, 16 N. J. Eq. 512, 530 (1863);

Appeal of FRANKENFIELD.

(Supreme Court of Pennsylvania, 1882. 11 Wkly. Notes Cas. 373, 127 Pa. 369, note.)

Appeal of Samuel A. Frankenfield from a decree of the Common Pleas of Lehigh County, dismissing his exceptions to and confirming the report of an auditor appointed by the court to audit appellant's final account as committee of Samuel Frankenfield, a lunatic. * * *

GREEN, J.⁴³ In this case the appellant, who was the committee of a lunatic, having trust funds in his hands, made a deposit of \$2,000 thereof in the Franklin Savings Bank of Allentown, Pa., and took a certificate therefor in the following form:

Certificate of Deposit.

Franklin Savings Bank, Allentown, Pa. [Stamp.]

November 11th, 1876.

S. A. Frankenfield, Committee of Samuel Frankenfield, has deposited in this bank two thousand dollars, payable to his order, three months after date, with interest at the rate of six per cent per annum, on return of this certificate.

Thirty days' notice to be given of the intention to withdraw this deposit.
\$2,000.

J. E. Zimmerman, Cashier.

D. H. Muller, President.
Per J. E. Z.

The deposit was made in the name of the committee as such, it was done by the advice of counsel, and at the time of the transaction the bank was in good repute. So far, therefore, as these considerations affect the question of the appellant's liability for the loss of the money by reason of the insolvency of the bank, it must be conceded at once that no liability would arise. There was no bad faith on the part of the appellant, and although the bank was really insolvent when the deposit was made, that fact was not known in the community. The question at issue is thus reduced to the narrowest limits. If this had been an ordinary deposit, subject to the check of the depositor from the day it was made, it is very probable the appellant would not have

Sherman v. Lanier, 39 N. J. Eq. 249, 252 (1884); *Dufford v. Smith*, 46 N. J. Eq. 216, 18 Atl. 1052 (1889); *Brewster v. Demarest*, 48 N. J. Eq. 559, 23 Atl. 271 (1891); *Smith v. Smith*, 4 John. Ch. (N. Y.) 281 (1820); *Lefever v. Hasbrouck*, 2 Dem. Sur. (N. Y.) 567 (1882); *Matter of Foster*, 15 Hun (N. Y.) 387 (1878); *Matter of Cant*, 5 Dem. Sur. (N. Y.) 269 (1886); *In re Blauvelt's Estate*, 2 Con. Sur. 458, 20 N. Y. Supp. 119 (1890); *Nyce's Estate*, 5 Watts & S. (Pa.) 255, 256, 40 Am. Dec. 498 (1843); *Wills' Appeal*, 22 Pa. 325 (1853); *Wynne v. Warren*, 2 Heisk. (Tenn.) 118 (1870); *Simmons v. Oliver*, 74 Wis. 633, 43 N. W. 561 (1889).

Contra: *Higgins v. McClure*, 7 Bush (Ky.) 379 (1870); *Clark v. Anderson*, 13 Bush (Ky.) 111, 119 (1877); *Glover v. Glover*, McMull. Eq. (S. C.) 153 (1841); *Nance v. Nance*, 1 S. C. 209 (1869); *Barney v. Parsons*, 54 Vt. 623, 41 Am. Rep. 858 (1882).

⁴³ Statement of facts abridged and only part of the opinion given.

been liable. But it was not such a deposit. In practical effect, it was a loan to the bank for a fixed period and payable with interest. During that period it was entirely beyond the control of the depositor. He could make no legal demand for the money until at least three months had expired, and not even then unless he had given thirty days' notice of his intention to withdraw the fund. In no essential feature does this transaction differ from an ordinary loan. It is true, the borrower is a bank and not an individual. But that circumstance is of no moment in determining the character of the transaction. It is a loan still, just as it would have been had the depository been a citizen or a firm of the greatest wealth, or a manufacturing or a business corporation of large capital and resources. In these latter cases the security would apparently have been greater, for the capital of this bank was actually very small. The distinguishing feature of the case is, that even if the money be regarded as deposited in the technical sense, it was also loaned, and hence was subject to the quantities and incidents of a loan superadded to those which belonged to it as a deposit. Nor does the brevity of the time affect the question. There could be no difference in principle between a deposit payable in three months and one payable in twelve or twenty-four months, when the question relates only to its character as a loan. This being so, the law regulating the investments by committees of lunatics becomes applicable to the case and controls it. The Act of June 12, 1836, § 25, expressly directs that such investments must be made under the direction of the Court of Common Pleas, and only exempts the committee from liability for loss when he pursues this course, and in good faith (*Purd. Dig.* 983, pl. 25). In *Hemphill's Appeal*, 6 Harr. 303, it was formally and definitely settled that a trustee can only protect himself from risk when he invests the trust fund in real or governmental securities or makes the investment in pursuance of an order by the court. On p. 306, Black, C. J., says: "It has never been doubted anywhere that a loss which accrues to a trust fund, invested on personal security, must be borne by the trustee." These considerations determine that the auditor and the court below were right in holding the appellant liable for the loss of the sum of one thousand dollars, deposited with the Franklin Savings Bank. * * *

[Decree reversed on other grounds.]⁴⁴

Estate of W. W. LAW, a Minor.

(Supreme Court of Pennsylvania, 1891. 144 Pa. 499, 22 Atl. 831, 14 L. R. A. 103.)

On October 13, 1890, the account of Henry W. Scott, guardian of William W. Law, a minor, was called for audit before Ashman, J.,

⁴⁴ See *Rehden v. Wesley*, 29 Beav. 213 (1861); *Baer's Appeal*, 127 Pa. 360, 18 Atl. 1, 4 L. R. A. 609 (1889); *Law's Estate*, 144 Pa. 499, 22 Atl. 831, 14 L. R. A. 103 (1891); *Baskin v. Baskin*, 4 Lans. (N. Y.) 90 (1871).

when a credit was claimed by the accountant for the sum of \$3,339.12. The allowance of the credit was objected to by the Commonwealth Title Insurance & Trust Company, substituted guardian of said minor.

Before the auditing judge, it was made to appear that on January 29, 1890, the accountant received \$3,339.12 of the money of his ward, part of the proceeds of a policy of life insurance, and immediately placed it in the Bank of America, where it remained until the bank failed on April 30, 1890; that the money was deposited in the accountant's name as guardian; that the accountant had been advised by an officer of the Philadelphia Finance Company, the surety on his bond, that the bank mentioned was entirely solvent and safe; that for several years the accountant had kept his personal account as a depositor in the same institution; that there was nothing upon the deposit book, or the books of the bank, indicating that the placing of the ward's money in the bank was other than an ordinary deposit, but the accountant testified that he had a verbal agreement with the bank whereby the bank agreed to allow him three per cent. interest, if he would allow the money to remain until he should find an investment for it, and he was to give two weeks' notice before withdrawing it.

The auditing judge allowed the credit claimed, and decreed a balance of \$1,620.50 to be due by the accountant.

Exceptions to the adjudication, filed by the Commonwealth Company, substituted guardian, were sustained.

A formal decree having been filed, adjudging that the accountant pay to the Commonwealth Company, the substituted guardian, the sum of \$5,126.58, the Philadelphia Finance Company, surety upon the bond of the accountant, took this appeal, specifying that the court erred in not confirming the adjudication and dismissing the exceptions thereto.

Mr. Justice CLARK.⁴⁵ This is an appeal by the Philadelphia Finance Company, surety upon the guardianship bond of Henry W. Scott, guardian of William W. Law, from the adjudication of the Orphans' Court of Philadelphia County, upon the account of said guardian. On January 29, 1890, Scott received \$3,339.12 of the money of his ward, and immediately deposited the same in the Bank of America. The accountant had kept his personal account, as a depositor, in the same institution for several years, and had been advised by an officer of the Finance Company, which latter company was surety on his bond as guardian, that the Bank of America was entirely solvent and safe. The deposit was in a separate account, in the name of the guardian as such. No certificate was issued; the whole transaction was evidenced only by an entry of credit upon the books of the bank in the usual form. The accountant was in search of an investment, and the deposit was to remain only until he could find one. The bank agreed to allow him three per cent. interest, but he

⁴⁵ A part of the opinion is omitted.

was to give 'two weeks' notice before withdrawing it. The bank failed on the thirteenth of April following. At the time of the deposit the bank was in good repute, and there is no allegation of bad faith, or want of due care or diligence. The only question for our consideration is whether or not, under such circumstances, the trustee is responsible for the amount of the deposit.

As a general rule, the measure of care and diligence required of a trustee is such as would be pursued by a man of ordinary prudence and skill, in the management of his own estate. *Fahnestock's Appeal*, 104 Pa. 46. It is equally well settled, however, that a trustee who invests the funds belonging to a trust on personal security does so at his own risk. This is so well settled that a citation of authorities is unnecessary. * * *

Banks of deposit are a recognized necessity in the commercial world. A trustee who would continuously keep for any considerable length of time a large sum of money about his person or in his house, rather than deposit it for safe-keeping in a solvent and reputable bank or trust company, where all the precautions may be exercised for its safety, might justly be regarded as derelict in duty. No one would be accredited with the exercise of common prudence who would keep his own money in this way; and a trustee, as we have said, is held generally for such care and diligence as an ordinarily prudent man would exercise in the conduct and management of his own business. * * *

Was this transaction with the Bank of America a deposit of the money, or was it a loan or investment of it? A deposit is where a sum of money is left with a banker for safe-keeping subject to order, and payable, not in the specific money deposited, but in an equal sum. It may or it may not bear interest, according to the agreement. Whilst the relation between the depositor and his banker is that of debtor or creditor simply, the transaction cannot in any proper sense be regarded as a loan, unless the money is left not for safe-keeping but for a fixed period at interest, in which case the transaction assumes all the characteristics of a loan. The Orphans' Court decided this case upon the rulings of this court in *Frankenfield's App.*, 11 Wkly. Notes Cas. 373, and *Baer's App.*, 127 Pa. 360, 18 Atl. 1, 4 L. R. A. 609; but we think these cases are readily distinguishable from the case at bar. In *Frankenfield's Appeal*, supra, there was a loan by the trustee of two thousand dollars of trust funds to the Franklin Savings Bank for three months, with interest at six per cent.; thirty days' notice to be given of the trustee's intention to withdraw the deposit. The bank was in good repute, and there was no evidence of bad faith or want of care on the part of the trustee. Our Brother Green, in the opinion filed, said: "If it had been an ordinary deposit, subject to the check of the depositor from the day it was made, the appellant would probably not have been liable; but

it was not a deposit, it was a loan upon merely personal security for a fixed period, at interest; and during that period the money, because of the loan, was entirely beyond the trustee's control. The twenty-fifth section of the Act of June 12, 1836, expressly provides that such investments must be made under the direction of the Court of Common Pleas, and only exempts the trustee from liability when he pursues this course in good faith." In Baer's Appeal, *supra*, the banker's certificate of deposit was substantially in the same form as in Frankenhof's Appeal, *supra*, excepting that there was no stipulation for notice of the withdrawal of the deposit. The transaction possessed all the qualities of a loan of money for a year at four per cent. interest. It is of no consequence that the borrower is a bank, for a bank may borrow money. Parties engaged in the banking business, whether as individuals or as members of a partnership or of a corporation, may take a loan of money for a fixed period of time at interest, with like effect as persons engaged in other pursuits. The transactions may be termed a time deposit, but it is none the less a loan, and subjects the lender to that decree of responsibility.

In the present case, the money was placed in the bank, not as an investment for any fixed period, but merely for safe-keeping, and at a small rate of interest until a suitable investment could be found. This was the express understanding of both parties at the time. The transaction was entered upon the books of the bank as a deposit merely. It was treated as a temporary, provisional, or precautionary arrangement. No person would speak of this as an investment; an investment carries with it a greater or less degree of permanency, which does not characterize this transaction. It is true that two weeks' notice was to be given of the withdrawal of the deposit, but this was a reasonable provision and not inconsistent with a bank deposit. Almost all savings institutions stipulate for notice of withdrawal with their depositors, and such a stipulation is for the benefit not only of the bank, but also of its depositors; the reasonableness of the time is a question in each case to be determined by the court. It is said the trustee thereby loses control of the money; but that is not the true test. The depositor always, in a certain sense, loses control of the money when he places it in bank; for the bank may refuse payment of his checks, and, as he then has no claim upon this specific money, he stands upon the footing of a creditor merely. It is true, a trustee, as a general rule, is not allowed to part with the control of trust money. *Salway v. Salway*, 2 Russ. & M. 215. But he may do so by way of precaution against loss, by a deposit in a solvent and reputable bank. A deposit, as we have said, is a temporary disposition of money for safe-keeping; and it is upon this ground alone that the trustee is justified in depositing trust funds in bank, and it is upon the same ground that a deposit is distinguishable from an investment.

We are of opinion, for the reasons stated, that the trustee was not properly chargeable with this loss.

Decree reversed, with costs.⁴⁶

CANN v. CANN.

(In Chancery, before Kay, Justice, 1884. 33 Weekly Reporter, 40.)

Adjourned summons.

This was an application by the defendants to vary the chief clerk's certificate, whereby a sum of £138. 11s. 4d. had been disallowed.

The defendants were the surviving trustees and executors of the will and codicil of Samuel Cann, which were dated in 1854 respectively. The said will contained a trust for investment, directing the trustees to invest in parliamentary stock or funds, or on government or real securities in England and Wales, with the usual power to vary investments. The trust estate produced an annual income of about £700. In May, 1869, the trustees deposited the sum of £500. belonging to the trust estate, which had been previously invested on a mortgage, at Messrs. Harvey & Hudson's Bank at Norwich, in order that they might look for another mortgage. The money remained on deposit until the 16th of July, 1870, when the bank failed. The said sum of £138. 11s. 4d. represented the loss thereby occasioned, and the question was whether the trustees were liable to make it good.

KAY, J. It is extremely difficult in these cases to know where to draw the line. Here there is an estate producing £700. a year. A mortgage of £500. is paid off, and the trustees pay that money into a bank for the purpose of getting another mortgage. The question is, whether it was within their powers as trustees to leave that sum in the bank for fourteen months. It seems to me that that was too long. If after six months they could not get a mortgage they ought to have invested in consols. Without attempting to draw a hard and fast line—for I consider that each of these cases must be judged on its merits—I say that leaving that money in the bank for fourteen months was

⁴⁶ *Adams v. Claxton*, 6 Ves. Jr. 226 (1801); *France v. Woods*, Tamlyn, 172 (1829); *Lord Dorchester v. Earl of Effingham*, Tamlyn, 279 (1829); *Johnson v. Newton*, 11 Hare, 160 (1853); *Wilks v. Groom*, 3 Drew. 584 (1856); *Swinfen v. Swinfen*, 29 Beav. 211 (1860); *Fenwick v. Clarke*, 4 De G., F. & J. 240 (1862); *In re Marcon's Estate*, 40 L. J. Ch. (N. S.) 537 (1871); *In re Earl*, 39 W. R. 107 (1890); *Norwood v. Harness*, 98 Ind. 134, 49 Am. Rep. 739 (1884); *Jacobus v. Jacobus*, 37 N. J. Eq. 17 (1883); *People v. Faulkner*, 107 N. Y. 477, 14 N. E. 415 (1887); *Moore v. Eure*, 101 N. C. 11, 7 S. E. 471, 9 Am. St. Rep. 17 (1888); *Ramsey v. McGregor*, 1 Cinc. Super. Ct. R. 327 (1871); *Odd Fellows' Ben. Ass'n v. Ferson*, 3 Ohio Cir. Ct. R. 84 (1888).

The fact that the deposit draws interest is immaterial. See, in addition to the principal case, *France v. Woods*, Tamlyn, 172 (1829); *Wilks v. Groom*, 3 Drew. 584 (1856); *Fenwick v. Clarke*, 4 De G., F. & J. 240 (1862); *In re Marcon's Estate*, 40 L. J. Ch. (N. S.) 537 (1871); *People v. Faulkner*, 107 N. Y. 477, 14 N. E. 415 (1887).

leaving it there too long. The moment they began to leave the money there too long they became responsible for all the consequences of their default; and they are, therefore, liable for the £138. which has been lost. I must dismiss the summons with costs.⁴⁷

In re ARGUELLO.

(Supreme Court of California, 1893. 97 Cal. 196, 31 Pac. 937.)

Appeal from an order of the Superior Court of San Diego County, requiring an administrator to pay the creditors of the estate certain sums of money.

BELCHER, C.⁴⁸ This is an appeal by the administrator of the estate of the decedent from an order of the Superior Court of San Diego County requiring him to pay to the creditors of the estate whose claims had been duly presented and allowed certain sums of money.

The sum of money in controversy was \$4,846.80, which was received by the administrator for and on account of the estate, between July 5, 1891, and October 15, 1891, and deposited by him in the California Savings Bank, in the City of San Diego in his own name.

The court below found the facts to be as follows:

"That at the time said funds were deposited by said administrator in said California Savings Bank, said bank was reputed to be and was considered a safe and solvent bank and place of deposit, and was of good credit and standing, and was believed by said administrator to be solvent and safe; that said deposit was made in the individual name" of the administrator "without any designation or indication of his representative capacity, but said administrator had no other funds or account with said bank, and deposited such with that particular bank for the express purpose of keeping the same separate from, and so that it would not be unnecessarily mingled with, his own property or individual funds."

"That in depositing said funds in said California Savings Bank as aforesaid, said administrator acted in good faith."

⁴⁷ In the following cases, also, trustees were charged with losses caused by the failure of banks, because they had left trust moneys on deposit too long. *Moyle v. Moyle*, 2 Russ. & Myl. 710 (1831); *Barney v. Saunders*, 16 How. 535, 14 L. Ed. 1047 (1853); *Woodley v. Holley*, 111 N. C. 380, 16 S. E. 419 (1892).

In *Whitecar's Estate*, 147 Pa. 368, 23 Atl. 575 (1892), a trustee, having left trust moneys on deposit for fifteen years, was surcharged with 1 per cent. as loss to the cestui que trust from failure to invest.

If a trustee leaves too large a balance on deposit, he will be liable for the excess beyond a proper balance. *Astbury v. Beasley*, 17 W. R. 638 (1869).

When it is a trustee's duty to pay over trust moneys, and, instead of so doing, he leaves them on deposit in bank, he does so at his peril. *Lunham v. Blundell*, 27 L. J. Ch. 179 (1858); *Wilkinson v. Bewick*, 4 Jur. (N. S.) 1010 (1858); *Gough v. Eddy*, 20 L. T. R. 358 (1869); *Ricks v. Broyles, Rec'r*, 78 Ga. 610, 3 S. E. 772, 6 Am. St. Rep. 280 (1887).

⁴⁸ Only a part of the opinion is given.

"That on the 12th day of November, 1891, said California Savings Bank became suddenly, unexpectedly, and wholly insolvent, suspended business, and has not been able to pay the amount so deposited by said administrator with it, or any part of it."

"That said administrator has been guilty of no negligence or want of care in the administration of said estate, except that he deposited such funds in the California Savings Bank in his own name, instead of in his representative capacity, or in the name of the estate."

And as conclusions of law the court found that the administrator was responsible for the money so deposited by him, and that he must pay it over to the creditors of the estate.

The appellant contends that an administrator is only required to act in good faith, and to exercise such skill, prudence, and diligence in managing the affairs of the estate as men ordinarily bestow upon their own affairs, and that when he has, in good faith and with reasonable care, deposited funds of the estate in bank, which have been subsequently lost by the failure of the bank, he will not be held liable for the loss, unless he has wilfully and unnecessarily mingled the trust property with his own, so as to constitute himself in appearance its absolute owner; and hence, that, under the facts found in this case, the order of the court was erroneous, and should be reversed.

The question presented has many times been before the courts of England and of this country, and the decisions upon it have been practically unanimous, and to the same effect as the decision of the court below in this case.

The law upon the subject is stated in Perry on Trusts, § 443: "A trustee may deposit money temporarily in some responsible bank or banking house; and if he acted in good faith and with discretion, and deposited the money to a trust account, he will not be liable for its loss * * * but he will be liable for the money in case of a failure of the bank, or for its depreciation, if he deposits it to his own credit, and not to the separate account of the trust estate." And again, in section 463: "So if the trustee pays the money into a bank in his own name, and not in the name of the trust, he will be responsible for the money in case of the failure of the bank." [Authorities cited.]

But whatever may be the rule elsewhere, appellant insists that the rule in this case is declared in section 2236 of the Civil Code, and that that does not make him liable. The section referred to reads as follows:

"Sec. 2236. A trustee who wilfully and unnecessarily mingles the trust property with his own, so as to constitute himself in appearance its absolute owner, is liable for its safety in all events."

We do not think this section was intended to change the rule generally prevailing, or to limit liability under it; on the contrary, the section seems to be in entire accord with the general rule, and in effect to declare it in unmistakable terms.

In our opinion the order appealed from should be affirmed.

VANCLIFF, C., and HAYNES, C., concur.

For the reasons given in the foregoing opinion, the order appealed from is affirmed.⁴⁹ PATERSON, J.; GAROUTTE, J.; HARRISON, J.

DENIKE et al. v. HARRIS et al.

(Court of Appeals of New York, 1881. 84 N. Y. 89.)

Appeal from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made December 14, 1880, affirming a judgment in favor of plaintiffs, entered upon a decision of the court on trial at Special Term.

EARL, J.⁵⁰ For some time before his death the testator was a special partner of the defendant in the business of selling agricultural implements; and as such special partner he had contributed to the capital of the partnership the sum of \$15,000. * * * On the 17th day of July thereafter he made and published his will, in which he nominated his partner, Reeves, and the defendant Harris as his executors; and he died on the 6th of September, 1879. The will was subsequently admitted to probate, and the executors qualified and entered upon their duties as such. * * *

The tenth clause of the will, which gave rise to the present controversy, is as follows: "It is my will, and I do hereby order and direct

⁴⁹ *Ditmar v. Bogle*, 53 Ala. 169 (1875); *Harward v. Robinson*, 14 Ill. App. 560 (1884); *Naltner v. Dolan*, 108 Ind. 500, 8 N. E. 289, 58 Am. Rep. 61 (1886); *Succession of Milmo*, 47 La. Ann. 126, 16 South. 772 (1895); *Jenkins v. Walter*, 8 Gill & J. (Md.) 218, 29 Am. Dec. 539 (1836); *Estate of Horner*, 66 Mo. App. 531 (1896); *Baskin v. Baskin*, 4 Lans. (N. Y.) 90 (1871); *Summers v. Reynolds*, 95 N. C. 404 (1886); *Williams v. Williams*, 55 Wis. 300, 12 N. W. 465, 13 N. W. 274, 42 Am. Rep. 708 (1882); *Booth v. Wilkinson*, 78 Wis. 652, 47 N. W. 1128, 23 Am. St. Rep. 443 (1891); *O'Connor v. Decker*, 95 Wis. 202, 70 N. W. 286 (1897).

Contra: *Atterberry v. McDuffee*, 31 Mo. App. 603 (1888), explained in *Estate of Horner*, 66 Mo. App. 531 (1896); *Parsley's Adm'r v. Martin*, 77 Va. 376, 46 Am. Rep. 733 (1883); *Gregory v. Parker*, 87 Va. 451, 12 S. E. 801 (1891).

If the trustee deposits trust money in his individual account and mingles it with his own money he is, a fortiori, answerable for the safety of the bank. *Wren v. Kirton*, 11 Ves. Jr. 377 (1805); *Fletcher v. Walker*, 3 Mad. 73 (1818); *Massey v. Banner*, 4 Mad. 413 (1819), affirmed 1 J. & W. 241 (1820); *Robinson v. Ward*, 2 C. & P. 59 (1825); *Macdonnell v. Harding*, 7 Sim. 178 (1834); *Pennell v. Deffell*, 4 De G., M. & G. 372, 392 (1853); *Henderson v. Henderson*, 58 Ala. 582 (1877); *Allen v. Leach*, 7 Del. Ch. 83, 29 Atl. 1050 (1894); *Webster v. Pierce*, 35 Ill. 158 (1864); *Cartmell v. Allard*, 7 Bush (Ky.) 482 (1870); *Norris v. Hero*, 22 La. Ann. 605 (1870); *Coleman v. Lipscomb*, 18 Mo. App. 443 (1885); *Matter of Stafford*, 11 Barb. (N. Y.) 353 (1851); *Shaw v. Bauman*, 34 Ohio St. 25 (1877); *Commonwealth v. McAllister*, 28 Pa. 480 (1857); *Id.*, 30 Pa. 536 (1858); *Mason v. Whitthorne*, 2 Cold. (Tenn.) 242 (1865); *Vaiden v. Stubblefield*, 28 Grat. (Va.) 153 (1877).

Contra: *Crane v. Moses*, 13 S. C. 561 (1879).

⁵⁰ Only a part of the opinion is given.

my executors, hereinafter named, to allow my friend, Robert C. Reeves, to retain, as a loan to him out of my personal estate, the sum of \$15,000, being the amount now invested by me in the business carried on and conducted by him, and in which I am a special partner, to be used and employed by him in carrying on and conducting the said business, and to be continued from year to year at the option of the said Robert C. Reeves, but not to exceed the term of three years, upon his paying the interest thereon annually at the rate of five per cent. per annum. Such income, when received by my executors, to be from time to time paid over to my residuary legatees, and at the expiration of said term, or the sooner determination thereof at his option aforesaid, I direct my said executors to receive from the said Robert C. Reeves the said sum of money and interest, and to discharge him fully from all further liability on account or by reason of such indebtedness, and upon such payment being made to my said executors, the said sum of \$15,000 is to become a part of my residuary estate, and to be distributed according to the provisions of this my will with respect thereto." * * *

The plaintiffs, two of the three residuary legatees named in the will, for themselves and the other residuary legatee, commenced this action to restrain the executors from making the loan to Reeves mentioned in the tenth clause of the will, without requiring of him security therefor. They alleged in their complaint, among other things, that the executors proposed and intended to make the loan without taking security; that the business in which Reeves was engaged was one peculiarly of great risk, and that he had but little or no property. The defendants in their answer, among other things, denied that the business of Reeves was one peculiarly of great risk, as alleged in the complaint, and they denied that he had little or no property, and alleged that he was and had at all times been solvent and able to pay all his debts.

The court, at Special Term, found, upon the allegations in the complaint and answer above specified, without any proof, that the business in which Reeves was engaged was one of risk—not that it was peculiarly risky, or more risky than other kinds of commercial or mercantile business. He also found that Reeves intended to use the money, if loaned to him, in his business, and that it would thus be at risk, peril and jeopardy, and liable to be lost; that the executors intended to loan him the money, and refused to take any security therefor, although they had been requested to do so by the plaintiffs. And the court ordered judgment for plaintiffs, among other things, that the executors should not loan the \$15,000 to Reeves, or permit him to retain that sum, as provided in the tenth clause of the will, without requiring and obtaining from him sufficient and proper security for the safe payment and return of the sum thus loaned or retained at the end of the three years. The judgment thus ordered was, upon appeal by the defendants, affirmed at the General Term, and then they appealed to this court.

The claim of the plaintiffs, which has thus far been sustained by the Supreme Court, is, that in making this loan, the defendants are in the position of all trustees authorized to loan trust funds, and that they are bound by the general rules of law to take proper security. That rule is supposed to require trustees exercising a general authority to make investments to take government or real estate securities. *King v. Talbot*, 40 N. Y. 76. But the creator of a trust requiring the investment of money may designate how the investment may be made, and what security may be taken, and he may dispense with all security. The question here is, did the testator intend that Reeves should give security for the sum to be retained by or loaned to him? We think it clear that he did not. * * * The language used precludes the idea of security. As executor he was required to give no security. The property was then in his hands, and as surviving partner he was required to give no security. He was to be allowed "to retain" the sum named. If the testator had intended that security should be exacted for the loan, that matter would have been in his mind and probably expressed. Here then the testator designated the person to whom the loan should be made and the rate of interest, and under such circumstances and in such language, that we think it was intended that the loan should be without security.

It matters not that the sum thus loaned is put in some jeopardy—subjected to such risks as ordinarily attend the carrying on of any business or the loaning of money upon mere personal security. The testator contemplated such risks, and was willing his executors should take them. * * *

The sum to be loaned was for use by Reeves "in carrying on and conducting" his business. He could not claim the loan for any other purpose. If he was actually insolvent, or if for any other reason he was not in a condition to go on with his business, he could not claim the loan.

We are, therefore, of opinion that no case was made justifying the decision rendered herein, and the judgment should be reversed and a new trial granted, costs to abide event.⁵¹

Judgment reversed.

⁵¹ For other instances of authority by the creator of a trust to loan on personal security, see *Forbes v. Ross*, 2 Bro. C. C. 430 (1788); s. c. 2 Cox, Eq. 113; *Langston v. Ollivant*, G. Cooper, 33 (1807); *Brown v. Sansome*, McCl. & Y. 427 (1825); *Stickney v. Sewell*, 1 Myl. & Cr. 8 (1835); *Paddon v. Richardson*, 7 De G., M. & G. 563 (1855); *Pickard v. Anderson*, L. R. 13 Eq. 608 (1872); *Knox v. Mackinnon*, 13 App. Cas. 753 (1888); *Rae v. Meek*, 14 App. Cas. 558 (1889); *In re Earl*, 39 W. R. 107 (1890); *In re Tucker*, L. R. (1894) 1 Ch. 724 (1893); *Lowry v. McGee*, 3 Head (Tenn.) 269 (1859).

NORBURY v. NORBURY.

(In Chancery, before Sir John Leach, Vice Chancellor, 1819.

4 Maddock, 191.)

On the coming on of this cause, for further direction, Mr. Bell desired that a reference might be made to the Master, to ascertain whether it would not be for the benefit of the infants, that a sum of money in the executor's hands should be laid out on mortgage, instead of being applied in the purchase of three per cents consols, as the interest on the mortgage would exceed the dividends of the money if laid out in the three per cents.

The Vice Chancellor said, he did not recollect that such permission had ever been given unless under very special circumstances, as where there was a mortgage or charge on the infant's estate, it being the constant course of the court to order the money to be laid out in the three per cents; but he permitted Mr. Bell to mention the matter again, if he should find any authority.

On this day [May 27, 1819] Mr. Bell mentioned the case of Poore v. Hawker, 5th August, 1816, in which the late Master of the Rolls directed a reference, to see whether it was for the benefit of the infant, to lay out a sum of £20,000. three per cents and £17,000. three per cents reduced, or any part thereof, on real security.

THE VICE CHANCELLOR. I am surprised that any such order should have been made. There must have been something very special in that case. If I were to order this reference, it would be equally right in every case to inquire what mode of investment would be most beneficial to the infant. The court adopts, as a general rule, that the investment in the three per cent. consols is most beneficial to the suitors of the court; and never varies from this rule without special circumstances.⁵²

Reference refused.

⁵² MORTGAGES OF REAL ESTATE.—Lord Harcourt, in *Brown v. Litton*, 1 P. Wms. 140 (1711), Lord Hardwicke, in *Ryder v. Bickerton*, 3 Sw. 80, note, 81 (1743), and Lord Alvanley, in *Pocock v. Reddington*, 5 Ves. Jr. 794, 800 (1801), thought trust moneys might be invested upon the security of mortgages of real estate. Lord Thurlow, however, in *Ex parte Cathorpe*, 1 Cox, Eq. 182 (1785), refused to allow an investment of trust moneys on a mortgage of land, and his view was generally followed in England. *Widdowson v. Duck*, 2 Mer. 494 (1817); *Re Fust*, *Cooper t. Cottenham*, 157, note "c" (1817); *Ex parte Ellice*, Jacob, 234 (1821); *Ridgeway Minors*, 1 Hogan, 309 (1825); *Ex parte Johnson*, 1 Molloy, 128 (1828); *Ex parte Franklyn*, 1 De G. & Sm. 528 (1848); *Barry v. Marriott*, 2 De G. & Sm. 491 (1848); *Raby v. Ridehalgh*, 7 De G., M. & G. 104 (1855).

In 1859, what is known as Lord St. Leonard's Act (22 & 23 Vict. c. 35) was passed, section 32 of which provided: "When a trustee, executor, or administrator shall not, by some instruments creating his trust, be expressly forbidden to invest any trust fund on real securities, in any part of the United Kingdom, or on the stock of the Bank of England or Ireland, or on East India stock, it shall be lawful for such trustee, executor, or administrator to invest such trust funds on such securities or stock; and he shall

In re SALMON.

PRIEST v. UPPLEBY.

(In the Court of Appeal, 1889. Law Reports, 42 Chancery Division, 351.)

Eliza Salmon died in 1841, leaving a will of which Uppleby and Fox were the trustees and executors. She bequeathed to them her personal estate upon trust to invest in parliamentary stocks or funds, or on real securities in England or Wales, with power to vary investments. The trusts were for Annette Bower for life, and then to such of her children as should attain twenty-one or marry.

Annette Bower had six children, all of whom attained twenty-one. Fox died in 1845.

In 1881 Uppleby, the surviving trustee, sold out the Government stock held upon the trusts of the will, and on the 18th of July, 1881, invested out of the proceeds £1,300. on a mortgage in fee of thirteen small freehold houses in Kingston-upon-Hull, with a power of sale.

Before taking this mortgage, Uppleby had the property valued by a

not be liable on that account as for a breach of trust, provided that such investment shall in other respects be reasonable and proper."

It has been decided in England that loans by trustees on contributory mortgages are improper. *Webb v. Jonas*, L. R. 39 Ch. Div. 660 (1888); *In re Massingberd's Settlement*, 63 L. T. R. 296 (1890); *In re Dive*, L. R. (1909) 1 Ch. 328 (1908). The creator of the trust may, of course, authorize a contributory mortgage. *In re Godfrey*, L. R. 23 Ch. Div. 483 (1883).

It will be observed that Lord St. Leonard's Act authorized loans of trust funds "on real securities." It said nothing of "first mortgages." In this country investments of trust funds on mortgages of real estate have been generally permitted without a statute.

SECOND MORTGAGES OF REAL ESTATE.—In *Ames on Trusts* (2d Ed.) 485, it is said: "In several jurisdictions it is a breach of trust to invest in second mortgages. *Gen. St. Conn.* 1888, § 495; *Mattocks v. Moulton*, 84 Me. 545, 24 Atl. 1004; *Gilmore v. Tuttle*, 32 N. J. Eq. 611; *Id.*, 36 N. J. Eq. 617; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Savage v. Gould*, 60 How. Prac. (N. Y.) 234; *Re Petrie*, 5 Dem. Sur. (N. Y.) 352; *Singleton v. Lowndes*, 9 S. C. 465. There are dicta to the same effect in *Thomson v. Christie*, 1 Macq. 236, 238; *Drosier v. Brereton*, 15 Beav. 221; *Lockhart v. Reilly*, 1 De G. & J. 464, 476; *Sheffield Society v. Aizlewood*, 44 Ch. Div. 412, 459."

The Connecticut statute quoted (now *Gen. St. Conn.* 1902, § 254) authorized the investment of trust funds (inter alia) in mortgages on unincumbered real estate in Connecticut, double the value of the amount loaned. Quare, if this necessarily prohibited by implication second mortgages. What was said in *Mattocks v. Moulton*, 84 Me. 545, 24 Atl. 1004 (1892), *Savage v. Gould*, 60 How. Prac. (N. Y.) 234 (1880), and *Re Petrie*, 5 Dem. Sur. (N. Y.) 352 (1886), was by way of dictum, and no one of the dicta supports the position that an investment of trust moneys on a second mortgage of real estate is per se a breach of trust. In *Gilmore v. Tuttle*, 32 N. J. Eq. 611 (1880), on appeal 36 N. J. Eq. 617 (1883), *Porter v. Woodruff*, 36 N. J. Eq. 174 (1882), and *Singleton v. Lowndes*, 9 S. C. 465 (1877), trustees who had invested trust moneys on second mortgages were charged with a loss, not because the loans were per se breaches of trust, but because the security for the loans when made was inadequate.

The dicta in *Thomson v. Christie*, 1 Macq. 236 (1852), and *Lockhart v. Reilly*, 1 De G. & J. 464 (1857), had reference to investments on second mortgages made before 22 & 23 Vict. c. 35, and, therefore, when all investments "on real securities," not authorized by a court of equity or by the

local valuer of reputation, who valued them at £1,750. They were not all finished at the time of the mortgage, and were let at weekly rents.

On the 15th of November, 1884, Uppleby retired from the trusts, and under a power in the will appointed Charles U. Bower and Thomas Bower, two of the sons of Annette Bower, trustees and duly transferred the £1,300. mortgage to them.

On the 14th of May, 1887, the new trustees sold the mortgaged property by auction under the power of sale in the mortgage deed for £840. leaving £820. net after deducting the costs of sale.

That the sale took place without any notice to Uppleby was not disputed.

In February, 1888, the plaintiff (an assignee of the interest of one of the six children of Annette Bower) commenced this action, claiming a declaration that the investment of the £1,300. was a breach of trust, that Uppleby might be ordered to replace the stock which he had sold out to make the investment, or otherwise to make good the loss to the estate and that upon his replacing the stocks the investments of the £820. might be transferred to him.

creator of the trust, were a breach of trust. In *Drosier v. Brereton*, 15 Beav. 221 (1851), the creator of the trust authorized investments "on real securities." An investment on second mortgage resulted in a loss, with which the trustee was charged. Lord Romilly said (page 226): "I have no doubt it was a breach of trust to lend this money on a second mortgage of house property." The investment was condemned, not because per se a breach of trust, but because the security, when taken, was inadequate.

In *Sheffield Society v. Aizlewood*, 44 Ch. Div. 412 (1889), Stirling, J., says, at page 459: "Again, part of the security consisted of a second mortgage, on which the rules of the court prohibited ordinary trustees from making advances." In *Want v. Campian*, Ch. Div. 9 Times L. R. 254 (1893), Mr. J. Wright said: "The numerous authorities cited showed that there was no fixed rule that a trustee must never invest on the security of a second mortgage; but having regard to the case of *Swaffield v. Nelson*, Weekly Notes 1876, p. 255, and the decision of Mr. Justice Stirling in *Sheffield & South Yorkshire Building Society v. Aizlewood*, 44 Ch. Div. 459, the burden of proof that it was a proper investment must fall upon the trustee." This position is supported by dicta in *Waring v. Waring*, 3 Ir. Ch. 331, 337 (1852), *Shuey v. Latta*, 90 Ind. 136, 139 (1883), *Whitney v. Martine*, 88 N. Y. 535, 539, 540 (1882), and *King v. Mackellar*, 109 N. Y. 215, 221, 16 N. E. 201 (1888).

In *Re Blauvelt's Estate* (Sur.) 20 N. Y. Supp. 119 (1890), and *Jack's Appeal*, 94 Pa. 367 (1880), investments in second mortgages were held proper, and the courts refused to charge trustees with losses thereon. See, further, *Bogart v. Van Velsor*, 4 Edw. Ch. (N. Y.) 718 (1848), and *Lechler's Appeal*, 21 Wkly. Notes Cas. (Pa.) 505 (1888).

If an investment on second mortgage were necessarily a breach of trust, the cestui que trust would have an absolute right to reject the investment and require the trustee to account for the money invested with interest. But in *Porter v. Woodruff*, 36 N. J. Eq. 174 (1882), *Van Fleet, V. C.*, at page 186, says: "I know of no authority which goes to the length of declaring that a trustee shall be liable, whether loss is sustained or not, simply because he has invested the funds in his hands in a second mortgage."

EQUITABLE MORTGAGES.—Investments by trustees on equitable mortgages are not allowed. *Webb v. Ledsam*, 1 Kay & J. 385 (1855); *Swaffield v. Nelson*, W. N. 255 (1876).

LEASEHOLD MORTGAGES.—Investments by trustees on the security of leaseholds are not allowed. *Wyatt v. Sharratt*, 3 Beav. 493 (1840); *Fyler v. Fy-*

Uppleby by his defence denied the insufficiency of the security, and stated that the plaintiff had been fully informed of the investments before he purchased Augustus Bower's share. He alleged that the sale was made by the new trustees with the privity and at the instigation of the plaintiff and without any previous notice of it to him (Uppleby), and that he never had the option given him of taking over the security on his paying the amount secured by it.

The action was tried by Mr. Justine Kekewich, who dismissed the bill with costs as against Mr. Uppleby and the new trustee and the plaintiff appealed.

COTTON; L. J.⁵⁸ This is an appeal by the plaintiff from a decision of Mr. Justice Kekewich dismissing an action brought against Uppleby, a retired trustee of the will of Eliza Salmon, to make him responsible for an improper investment.

There are two questions to be considered. The first is, whether the investment in question was wrongful. It was within the terms of the trust, for it was an investment on mortgage of a freehold estate. In one sense, therefore, it was in accordance with the trusts, and if the

ler, 3 Beav. 550 (1841); Fuller v. Knight, 6 Beav. 205 (1843); In re Chennell, L. R. 8 Ch. Div. 492 (1878); In re Boyd's Settled Estates, L. R. 14 Ch. Div. 626 (1880). Unless the leaseholds are for a long term and at a nominal rent. McCleod v. Annesley, 16 Beav. 600 (1853); In re Chennell, L. R. 8 Ch. Div. 492 (1878).

Formerly leasehold mortgages were not "real securities." In re Boyd's Settled Estates, L. R. 14 Ch. Div. 626 (1880); Leigh v. Leigh, 55 L. T. R. 634 (1887).

The Trustee Act 1888 (51 & 52 Vict. c. 59) § 9, provided: "A power to invest trust money in real securities shall authorize and shall be deemed to have always authorized an investment upon mortgage of property held for an unexpired term of not less than two hundred years and not subject to any reservation of rent greater than one shilling a year, or to any right of redemption, or to any condition for re-entry for non-payment of rent." See, also, Trustee Act 1893 (56 & 57 Vict. c. 53) pt. 1, § 5 (1) (a).

Trustees, unless authorized by the terms of the trust, have no right to purchase land with the trust money. Ouseley v. Anstruther, 10 Beav. 453, 456 et seq. (1847); Williams v. Williams, 35 N. J. Eq. 100 (1882); Eckford v. DeKay, 8 Paige (N. Y.) 89 (1840); Baker v. Disbrow, 3 Redf. (N. Y.) 348 (1878), affirmed 18 Hun (N. Y.) 29 (1879), affirmed 79 N. Y. 631 (1880); McLean v. Ladd, 66 Hun, 341, 21 N. Y. Supp. 196 (1892); Royer's Appeal, 11 Pa. 36 (1849); Morton v. Adams, 1 Strob. Eq. (S. C.) 72, 76 (1846); Mathews v. Heyward, 2 S. C. 239 (1870).

In general, investments in property beyond the jurisdiction of the trustees are disapproved. McCullough's Ex'rs v. McCullough, 44 N. J. Eq. 313, 14 Atl. 123 (1888); Ormiston v. Olcott, 84 N. Y. 339 (1881); Denton v. Sanford, 103 N. Y. 607, 9 N. E. 490 (1886); Matter of Reed, 45 App. Div. 196, 61 N. Y. Supp. 50 (1899); Rush's Estate, 12 Pa. 375, 378 (1849). In Amory v. Green, 13 Allen, 413 (1866), the Supreme Court of Massachusetts authorized the purchase of land by trustees outside of their jurisdiction; and in Thayer v. Dewey, 185 Mass. 68, 69 N. E. 1074 (1904), the same court refused to disallow such investments. In Ex parte Copeland, Rice, Eq. (S. C.) 69 (1839), the court refused to permit a guardian appointed in Florida to receive the ward's property, so as to remove the same to Florida.

⁵⁸ Part of the statement of facts, a part of the opinion of Cotton, L. J., and the concurring opinions of Fry and Bowen, L. JJ., are omitted.

trustee took good care as to its sufficiency there would be no breach of trust, and nobody could complain, though it ultimately proved insufficient. The case differs from that of an investment not within the terms of the instrument, which is necessarily a breach of trust, so that if any loss occurs the trustees must be liable for it. The question here is, whether Uppleby took proper care in seeing to the sufficiency of the security.

Now as regards the rule which has been so much discussed, as to the amount which may be lent on a given security, the law is thus summed up in *Learoyd v. Whiteley*, 12 App. Cas. 727, 733: "As a general rule the law requires of a trustee no higher degree of diligence in the execution of his office, than a man of ordinary prudence would exercise in the management of his own private affairs. Yet he is not allowed the same discretion in investing the moneys of the trust as if he were a person *sui juris* dealing with his own estate. Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character; but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard. So, so long as he acts in the honest observance of these limitations, the general rule already stated will apply. The courts of equity in England have indicated and given effect to certain general principles for the guidance of trustees in lending money upon the security of real estate. Thus it has been laid down that in the case of ordinary agricultural land the margin ought not to be less than one-third of its value; whereas in cases where the subject of the security derives its value from buildings erected upon the land, or its use for trade purposes, the margin ought not to be less than one-half. I do not think that these have been laid down as hard and fast limits up to which trustees will be invariably safe, and beyond which they can never be in safety to lend, but as indicating the lowest margins which in ordinary circumstances a careful investor of trust funds ought to accept."⁵⁴ These rules are there recognized, though they have been impeached by Mr. Warmington and Mr. Wood. In the present case the value of the property was mainly derived from buildings. I do not think that the valuation of the property has been successfully impeached. We must take the property as having been worth £1,750. The trustees lent £1,300. upon it. Now, we must have regard not only to the value, but to the nature of the property. It consisted of small houses let at weekly rents, and we know the class of tenants likely to be attracted by cottage property in Hull. It was certainly not prudent to lend to this extent upon property the value of which depended on labourers' houses being wanted in that part of Hull. The

⁵⁴ See in *re Godfrey*, L. R. 23 Ch. Div. 483, 496 (1883); In *re Olive*, L. R. 34 Ch. Div. 70, 73 (1886).

investment, therefore, was a breach of trust as having been made improvidently.⁵⁵

The second point is new, and no authority is to be found upon it. It was contended that the plaintiff had taken part in the sale of the mortgaged property by the new trustees, and that therefore he could not call on the late trustee for the loss, because, as it was contended, the late trustee was entitled to notice of the intention to sell, so that he might have an opportunity of taking to the mortgage and paying to the trust fund the amount lent on it. If that be the law the late trustee is not liable. But there is a fallacy in this argument; it is founded on treating the mortgage as not being part of the trust estate. That view is wrong. The money was invested according to the terms of the trust, though without due care, and the mortgage was from the first a part of the trust estate. When Uppleby retired he transferred the mortgage to the new trustees, to be held on the trusts of the will, and, unless their acceptance of it exonerated him from his liability for taking an insufficient security, I do not see how he was exonerated from the consequences of his neglect of duty. The case is entirely distinct from that of an investment outside of the terms of the trust, which the cestui que trust must accept or reject. Here the trustee is only liable for the loss, and that liability is to be enforced when the investment is realized. I think that the realization was according to the power which Uppleby gave to the new trustees by handing over the investment to them, and he is liable for the deficiency. It is like a sale of mortgaged property by the mortgagee under a power without the concurrence of the mortgagor. If the sale is improperly made it may be impeached, but if it is made fairly the mortgagor is bound by it and is answerable for what remains due on the mortgage after deducting the proceeds of sale. I think that this mortgage was part of the trust property, that no duty therefore arose in the cestuis que trust to say whether they would accept or reject it, and that the late trustee is liable for the deficiency. * * *

I cannot agree with Mr. Justice Kekewich, and there must be a decree against Mr. Uppleby for the plaintiff's share of the deficiency.

⁵⁵ For other instances in which trustees were held liable for losses upon investments upon real estate mortgages made upon insufficient margin, see *Stickney v. Sewell*, 1 Myl. & Cr. 8 (1835); *Norris v. Wright*, 14 Beav. 291 (1851); *Macleod v. Annesley*, 16 Beav. 600 (1853); *Stretton v. Ashmall*, 3 Drew. 9 (1854); *Ingle v. Partridge*, 34 Beav. 411 (1865); *Budge v. Gummow*, L. R. 7 Ch. App. Cas. 719 (1872); *Hoey v. Green*, W. N. 236 (1884); *Fry v. Tapson*, L. R. 28 Ch. Div. 268 (1884); *Smethurst v. Hastings*, L. R. 30 Ch. Div. 490 (1885); *Walcott v. Lyons*, 54 L. T. R. 786 (1886); *In re Olive*, L. R. 34 Ch. Div. 70 (1886); *In re Whiteley*, 12 App. Cas. 727 (1887); *Re Partington*, 57 L. T. R. 654 (1887); *Knox v. Mackinnon*, 13 App. Cas. 753 (1888); *Rae v. Meek*, 14 App. Cas. 558 (1889); *In re Somerset*, L. R. (1894) 1 Ch. 231 (1893); *Guardianship of Cardwell*, 55 Cal. 137 (1880); *Bogart v. Van Velsor*, 4 Edw. Ch. (N. Y.) 718 (1848); *Blauvelt's Estate* (Sur.) 20 N. Y. Supp. 119 (1890); *Girard Trust Co.'s Appeal*, 13 Wkly. Notes Cas. (Pa.) 367 (1882); *Lechler's Appeal*, 21 Wkly. Notes Cas. (Pa.) 505 (1888).

See, further, *Trustee Act 1888* (51 & 52 Vict. c. 59) §§ 4 and 5; *Trustee Act 1893* (56 & 57 Vict. c. 53) pt. 1, §§ 8 and 9.

KING v. TALBOT.

(Court of Appeals of New York, 1869. 40 N. Y. 76.)

WOODRUFF, J.⁵⁶ It is conceded, that in England, the rule is, and has long been settled, that a trustee, holding funds to invest for the benefit of his cestui que trust, is bound to make such investment in the public debt, for the safety whereof the faith of their government is pledged; or in loans, for which real estate is pledged as security. And that, although the terms of the trust commit the investment, in general terms, to the discretion of the trustee, that discretion is controlled by the above rule, and is to be exercised within the very narrow limits, which it prescribes.

As a purely arbitrary rule resting upon any special policy of that country, or on any peculiarity in its condition, it has no application to this country. It is not of the common law. It had no applicability to the condition of this country, while a colony of Great Britain, and cannot be said to have been incorporated in our law.

So far, and so far only, as it can be said to rest upon fundamental principles of equity, commending themselves to the conscience, and suited to the condition of our affairs, so far it is true, that it has appropriate application and force, as a guide to the administration of a trust, here, as well as in England.

I do not, therefore, deem it material to inquire, through the multitude of English cases, and the abundant texts of the law writers, into the origin of the rule in England, or the date of its early promulgation. Nor, in this particular case, do I deem it necessary to determine whether it should, by precise analogy, be deemed to prohibit here investments in any other public debt, than that of the State of New York.

Neither, in my judgment, are we at liberty, in the decision of this case, to propound any new rule of conduct, by which to judge of the liability of trustees, now subjected to examination. Under trusts heretofore created, the managers thereof performed their duty with the aid of rules for the exercise of their discretion, which were the utterance of equity and good conscience, intelligible to their understanding, and available for their information; otherwise, trusts heretofore existing, have been traps and pitfalls to catch the faithful, prudent, and diligent trustee, without the power to avoid them.

But it is not true, that there is no underlying principle or rule of conduct in the administration of a trust, which calls for obedience. Whether it has been declared by the courts or not, whether it has been enacted in statutes or not, whether it is in familiar recognition in the affairs of life, there appertains to the relation of trustee and cestui que trust, a duty to be faithful, to be diligent, to be prudent in an

⁵⁶ The statement of facts and a part of the opinion of Woodruff, J., are omitted.

administration entrusted to the former, in confidence in his fidelity, diligence and prudence.

To this general statement of the duty of trustees, there is no want of promulgation or sanction, nor want of sources of information for their guidance. In the whole history of trusts, in decisions of courts for a century in England, in all the utterances of the courts of this and the other states of this country, and not less in the conscious good sense of all intelligent minds, its recognition is uniform.

The real inquiry, therefore, is, in my judgment, in the case before us, and in all like cases: Has the administration of the trust, created by the will of Charles W. King, for the benefit of the plaintiff, been governed by fidelity, diligence and prudence? If it has, the defendants are not liable for losses, which, nevertheless, have happened.

This, however, aids but little in the examination of defendants' conduct, unless the terms of definition are made more precise. What are fidelity, diligence and discretion? and what is the measure thereof, which trustees are bound to possess and exercise?

It is hardly necessary to say, that fidelity imports sincere and single intention to administer the trust for the best interest of the parties beneficially interested, and according to the duty, which the trust imposes. And this is but a paraphrase of "good faith."

The meaning and measure of the required prudence and diligence has been repeatedly discussed, and with a difference of opinion. In extreme rigor, it has sometimes been said, that they must be such and as great, as that possessed and exercised by the Court of Chancery itself. And again, it has been said, that they are to be such, as the trustee exercises in the conduct of his own affairs, of like nature, and between these is the declaration, that they are to be the highest prudence and vigilance, or they will not exonerate.

My own judgment, after an examination of the subject, and bearing in mind the nature of the office, its importance, and the considerations, which alone induce men of suitable experience, capacity, and responsibility to accept its usually thankless burden, is that the just and true rule is, that the trustee is bound to employ such diligence and such prudence in the care and management, as in general, prudent men of discretion and intelligence in such matters, employ in their own like affairs.

This necessarily excludes all speculation, all investments for an uncertain and doubtful rise in the market, and, of course, everything that does not take into view the nature and object of the trust, and the consequences of a mistake in the selection of the investment to be made.

It, therefore, does not follow that, because prudent men may, and often do, conduct their own affairs with the hope of growing rich, and therein take the hazard of adventures which they deem hopeful, trustees may do the same; the preservation of the fund, and the procurement of a just income therefrom, are primary objects of the creation of the trust itself, and are to be primarily regarded.

If it be said, that trustees are selected by the testator, or donor of the trust, from his knowledge of their capacity, and without any expectation that they will do more than, in good faith, exercise the discretion and judgment they possess, the answer is: First, the rule properly assumes the capacity of trustees to exercise the prudence and diligence of prudent men, in general; and, second, it imposes the duty to observe and know, or learn, what such prudence dictates in the matter in hand.

And once more, the terms of the trust, and its particular object and purpose, are in no case, to be lost sight of in its administration.

Lewin, in his *Treatise on the Law of Trusts*, etc. (page 332), states, as the result of the several cases, and as the true rule, that "a trustee is bound to exert precisely the same care and solicitude in behalf of the cestui que trust, as he would do for himself; but greater measure than this, a court of equity will not exact." In general, this is true, but if it imports that, if he do what men of ordinary prudence would not do, in their own affairs, of a like nature, he will be excused, on showing that he dealt with his own property in like want of discretion, it cannot be sustained, as a safe or just rule towards cestuis que trust; nor is it required by reasonable indulgence to the trustee; it would be laying the duty to be prudent out of the view entirely, and I cannot think the writer intended it should be so understood.

The Massachusetts cases (*Harvard College v. Amory*, 9 Pick. 446; *Lovell v. Minot*, 20 Pick. 116, 32 Am. Dec. 206), cited by the counsel for the defendant, are in better conformity to the rule, as I have stated it.

To apply these general views to the case before us, and with the deductions, which necessarily flow from their recognition: The testator gave to each of his children fifteen thousand dollars, the interest on the same, so far as required, to be applied to their maintenance and education, and the principal, with any accumulations thereon, to be paid to them severally on their majority; appointed the defendant, Talbot, and his partner, Mr. Olyphant, executors, "entrusting to their discretion the settlement of my affairs and the investment of my estate for the benefit of my heirs."

If I am correct in my views of the duty of trustees, this last clause neither added to, nor in any wise affected the duty or responsibility of these executors; without it, they were clothed with discretion; with it, their discretion was to be exercised with all the care and prudence belonging to their trust relation to the beneficiaries. Such is the distinct doctrine of the cases very largely cited by the counsel for the parties, and is, I think, the necessary conclusion from the just rule of duty I have stated.

What, then, was the office of the trustees, as indicated by the terms and nature of the trust? If its literal reading be followed, it directed that, "fifteen thousand dollars" in money be placed at "interest." The nature of the trust, according to the manifest intent of the testator,

required that, in order to the maintenance and support of infant children, whose need, in that regard, would be constant and unremitting, that interest should flow in with regularity and without exposure to the uncertainties or fluctuation of adventures of any kind. And then the fund should continue, with any excess of such interest accumulated for their benefit, so as to be delivered at the expiration of their minority.

Palpably, then, the first and obvious duty was to place that fifteen thousand dollars in a state of security; second, to see to it that it was productive of interest; and, third, so to keep the fund, that it should always be subject to future recall for the benefit of the *cestui que trust*.

I do not attach controlling importance to the word "interest" used by the testator, but I do regard it as some guide to the trustees, as an expression of the testator, that he did not contemplate any adventure with the fund, with a view to profits as such.

But, apart from the inference from the use of that word, I think it should be said, that whenever money is held upon a trust of this description, it is not according to its nature, nor within any just idea of prudence, to place the principal of the fund in a condition, in which it is necessarily exposed to the hazard of loss or gain, according to the success or failure of the enterprise in which it is embarked, and in which, by the very terms of the investment, the principal is not to be returned at all.

It is not denied, that the employment of the fund, as capital in trade, would be a clear departure from the duty of trustees. If it cannot be so employed under the management of a co-partnership, I see no reason for saying that the incorporation of the partners tends, in any degree, to justify it.

The moment the fund is invested in bank, or insurance, or railroad stock, it has left the control of the trustees; its safety and the hazard, or risk of loss, is no longer dependent upon their skill, care, or discretion, in its custody or management, and the terms of the investment do not contemplate that it ever will be returned to the trustees.

If it be said, that, at any time, the trustees may sell the stock, (which is but another name for their interest in the property and business of the corporation) and so repossess themselves of the original capital, I reply, that is necessarily contingent and uncertain; and so the fund has been voluntarily placed in a condition of uncertainty, dependent upon two contingencies: First, the practicability of making the business profitable, and, second, the judgment, skill, and fidelity of those who have the management of it for that purpose.

If it be said, that men of the highest prudence do, in fact, invest their funds in such stocks, becoming subscribers and contributors thereto, in the very formation thereof, and before the business is developed, and in the exercise of their judgment, on the probability of its safety and productiveness, the answer is, so do just such men,

looking to the hope of profitable returns, invest money in trade, and adventures of various kinds. In their private affairs, they do, and they lawfully may, put their principal funds at hazard; in the affairs of a trust they may not. The very nature of their relation to it forbids it.

If it be said, that this reasoning assumes, that it is certainly practicable so to keep the fund, that it shall be productive, and yet safe against any contingency of loss; whereas, in fact, if loaned upon bond and mortgage, or upon securities of any description, losses from insolvency and depreciation may, and do often happen, notwithstanding due and proper care and caution is observed in their selection. Not at all. It assumes and insists, that the trustees shall not place the fund where its safety and due return to their hands will depend upon the success of the business in which it is adventured, or the skill and honesty of other parties entrusted with its conduct; and it is in the selection of the securities for its safety and actual return, that there is scope for discretion and prudence, which, if exercised in good faith, constitute due performance of the duty of the trustees.

My conclusion is, therefore, that the defendants were not at liberty to invest the fund bequeathed to the plaintiff, in stock of the Delaware and Hudson Canal Company; of the New York and Harlem Railroad Company; of the New York and New Haven Railroad Company; of the Bank of Commerce; or of the Saratoga and Washington Railroad Company; and that the plaintiff was not bound to accept these stocks, as, and for his legacy, or the investment thereof.

In regard to the bonds of the Hudson River Railroad Company, and of the Delaware and Hudson Canal Company, it appears by schedule B, given in evidence, that the former were mortgage bonds; but what was the extent or sufficiency of the security afforded by such mortgage, or what property was embraced in it, does not appear, nor does it appear, whether there was any security whatever for the payment of the Canal Company's bond.

It is not necessary for the decision of this case and I am not prepared to say, that an investment in the bonds of a railroad, or other corporation, the payment whereof is secured by a mortgage upon real estate, is not suitable and proper, under any circumstances.

If the real estate is ample to ensure the payment of the bonds, I do not, at present, perceive, that it is necessarily to be regarded as inferior to the bond of an individual, secured by mortgage; it would, of course be open to all the inquiries which prudence would suggest, if the bond and mortgage were that of an individual. The nature, the location, and the sufficiency of the security, and the terms of the mortgage, and its availability for the protection and ultimate realization of the fund, must, of course, enter into the consideration.

But it is not necessary to pursue that subject. The plaintiff, in his complaint, rejects the entire investment. The court below held, that it was equitable that the plaintiff should be held to receive the whole or none of the stocks and bonds, and to that ruling, neither the plain-

tiff nor the defendants have excepted; and, therefore, the question, whether the judgment below was correct in that respect, is not before us.

It is proper, however, to say, that I do not clearly apprehend the propriety of that ruling, unless it be on the ground, that the plaintiff, in his complaint, did so elect.

The rule is perfectly well settled, that a cestui que trust is at liberty to elect to approve an unauthorized investment, and enjoy its profits, or to reject it at his option; and I perceive no reason for saying, that where the trustee has divided the fund in parts and made separate investments, the cestui que trust is not at liberty, on equitable as well as legal grounds, to approve and adopt such as he thinks it for his interest to approve. The money invested is his money; and in respect to each and every dollar, it seems to me, he has an unqualified right to follow it, and claim the fruits of its investment, and that the trustee cannot deny it. The fact, that the trustee has made other investments of other parts of the fund, which the cestui que trust is not bound to approve, and disaffirms, cannot, I think, affect the power. For example, suppose, in the present case, the cestui que trust on delivery to him of all the stocks and bonds in which his legacy had appeared invested, had declared: Although these investments are improperly made, not in accordance with the intent of the testator, nor in the due performance of your duty, I waive all objection on that account, except as to the stock of the Saratoga and Washington Railroad Company. That, I reject and return to you. Is it doubtful that his position must be sustained?

The result is, that the main features of the judgment herein must be affirmed. * * *

All the judges concur in the result to which Judge WOODRUFF arrived.

MURRAY, J., thought it a settled principle of law, in this State, that a trustee, holding trust funds, for investment for the benefit of minor children, must invest in Government or real estate securities, and that any other investment would be a breach of duty, and the trustee would be personally liable for any loss.⁵⁷ GROVER, DANIELS, and JAMES, JJ., concurred. HUNT, C. J., and MASON and LOTT, JJ., contra.

⁵⁷ *Trafford v. Boehm*, 3 Atk. 440 (1746); *Howe v. Earl of Dartmouth*, 7 Ves. Jr. 137 (1802); *Mills v. Mills*, 7 Sim. 501 (1835); *Davies v. Hodgson*, 25 Beav. 177 (1858); *Hynes v. Redington*, 1 J. & La T. 589 (1844); 7 Ir. Eq. 405; *Randolph v. East Birmingham Land Co.*, 104 Ala. 355, 16 South. 126, 53 Am. St. Rep. 64 (1893); *White v. Sherman*, 168 Ill. 589, 48 N. E. 128, 61 Am. St. Rep. 132 (1897); *Tucker v. State*, 72 Ind. 242 (1880); *Gilbert v. Welsch*, 75 Ind. 557 (1881); *Smith v. Smith*, 7 J. J. Marsh. (Ky.) 238 (1832)—see now Ky. St. 1903, § 4706, and *Robertson v. Robertson's Trustee*, 130 Ky. 293, 113 S. W. 138, 132 Am. St. Rep. 368 (1908)—*Ashurst v. Potter*, 29 N. J. Eq. 625, 631, 632 (1878); *Tucker v. Tucker*, 33 N. J. Eq. 235 (1880); *Re Mundy*, 3 N. J. Law J. 185 (1880); *Executors of Voorhees*, 3 N. J. Law J. 211 (1880); *Ackerman v. Emott*, 4 Barb. (N. Y.) 626 (1848); *Adair v. Brimmer*, 74 N. Y. 539 (1878); *Mills v. Hoffman*, 26 Hun (N. Y.) 594 (1882); *Hemphill's Appeal*, 18 Pa. 303 (1852); *Worrell's Appeal*, 23 Pa. 44 (1854); *Pray's Ap-*

FREDERICK DAVIS, Appellant.

(Supreme Judicial Court of Massachusetts, 1903. 183 Mass. 499, 67 N. E. 604.)

Appeal, from a decree of the Probate Court of the County of Suffolk, disallowing in part the fourteenth and fifteenth accounts of the surviving trustee under the will of Moses Day, late of Boston.

Hammond, J., reserved the case for the determination of the full court.

The details of the investments in the bonds and stock of the Atchison, Topeka & Santa Fé Railroad Company, described by the court, were as follows:

Jan. 15, 1883.	\$2000 6 per cent. bonds.....	\$ 2,000.00
Dec. 11, 1885.	5 shares of stock.....	\$ 428.12
	Reduced by sale of rights....	24.10
		<hr/>
		\$ 404.02
Dec. 24, 1886.	45 shares of stock.....	\$4,246.88
	Reduced by sale of rights....	97.65
		<hr/>
		4,149.23
Feb. 17, 1887.	6 shares of stock.....	\$ 593.50
	Reduced by sale of rights....	13.02
		<hr/>
		580.48
Dec. 28, 1887.	2 shares of stock.....	\$ 185.88
	Reduced by sale of rights....	.94
		<hr/>
		184.94
	Total stock.....	<hr/>
		5,318.67
June 18, 1887.	\$5000 collateral trust bonds.....	4,995.00
		<hr/>
		\$12,313.67

MORTON, J.⁵⁸ The first question in this case is whether in the investment of the trust funds in the stock and bonds of the Atchison, Topeka and Santa Fé Railroad Company, to the extent to which they invested in them, the trustees manifested the sound judgment and reasonable discretion and prudence which is required of trustees in such

peals, 34 Pa. 100 (1859); Ihmsen's Appeal, 43 Pa. 431 (1862); Simmons v. Oliver, 74 Wis. 633, 43 N. W. 561 (1889).

By Lord St. Leonard's Act (22 & 23 Vict. c. 35, 1859) § 32, investments of trust funds in Bank of England stock, Bank of Ireland stock, or East India stock were authorized. By 23 & 24 Vict. c. 38 (1860) § 10, the judges therein named were empowered to make general orders as to the investment of cash under the control of the court; and section 11 authorized trustees to invest trust funds in the same securities. The Trust Investment Act 1889 (52 & 53 Vict. c. 32) greatly extended the field of investment for trust funds in England. The field was still further extended by the Trustee Act 1893 (56 & 57 Vict. c. 53) pt. 1.

The Constitution of Alabama of 1875 (article 4, § 35) provides that "no act of the General Assembly shall authorize the investment of any trust fund by executors, administrators, guardians and other trustees in the bonds or stock of any private corporation." The same provision is found in the Constitution of Colorado (article 5, § 36) and that of Pennsylvania (article 3, § 22).

The statutes of the various states should be carefully consulted as to the investment of trust funds.

⁵⁸ A part of the opinion is omitted.

matters. The question is to be determined as of the time when the investments were made. There is also a question whether the general rule is affected by the language creating the trust. It is agreed that the purchases were made in perfect good faith and that before making them the trustee took the advice of persons on whose opinion he thought he was entitled to rely as to the value of the securities. It is also agreed that at the time of the purchases he had invested his own money to a considerable amount in stocks and bonds of the company.

The trust estate consisted of a fund of \$30,000 bequeathed by the testator to the trustees in trust, to invest the same and pay over the income to the testator's daughter during her life and upon her death to distribute and pay over the principal amongst her children. From 1883 to 1887 inclusive the trustees invested in the stock and bonds of the Atchison, Topeka and Santa Fé Railroad Company upwards of \$12,000 of the trust funds as follows: On January 15, 1883, they purchased \$2,000 of the six per cent sinking fund bonds issued by that company and secured by mortgage bonds of various railroad companies whose lines composed a part of the Atchison system. On December 11, 1885, they purchased five shares of the stock, on December 24, 1886, forty-five shares of stock, on February 17, 1887, six shares of the stock, on June 18, 1887, \$5,000 collateral trust bonds issued by it and secured by mortgage bonds of various railroads, and on December 28, 1887, two shares of the stock. Prior to the last purchase of bonds and the last two purchases of stock between a quarter and a fifth of the trust property had been invested in the stock and bonds of the company. The Probate Court disallowed the last purchase of bonds and the last two purchases of stock and allowed the other investments. In *Dickinson*, Appellant, 152 Mass. 184, where the facts in regard to the situation of the corporation whose stock was purchased were very similar to the facts in this case, the decision was in effect that so much of the investment as was in excess of a quarter to a fifth of the whole trust fund could not be sustained as made in the exercise of a sound discretion. The court declined to say that the trustee had so far failed to exercise a sound discretion that the investment should be held to be wholly unauthorized, but disallowed them in part. We do not see how this case can be fairly distinguished from that, the fact that the investment was partly in stock and partly in bonds of the company not being sufficient, it seems to us, to distinguish it. And while we recognize in this case as the court did in that "the hardship of compelling a trustee to make good out of his own property a loss occasioned by an investment of trust property which he has made in good faith, and upon the advice of persons whom he thinks to be qualified to give advice," we cannot in this case any more than the court could in that hold upon the evidence the trustee was justified in investing in the stock and bonds in question so large a proportion of the trust property.

The remaining question is whether the language of the will creating the trust takes the case out of the general rule and relieves the trustee from liability on account of imprudent investments, if made in good faith. * * *

The will contains no direction as to the security in which the trustees are to invest. That matter is left to their judgment and discretion, and we think that in such a case the general rule applies, and that they are bound to exercise a sound judgment and a reasonable and prudent discretion. *Dickinson Appellant*, *ubi supra*; *Mattocks v. Moulton*, 84 Me. 545, 24 Atl. 1004; *King v. Talbot*, 40 N. Y. 76; *Kimball v. Reding*, 31 N. H. 352, 64 Am. Dec. 333.

We agree with the judge of the Probate Court in thinking that the words "with full power to make purchases, investments and exchanges * * * in such manner as to them shall seem expedient; it being my intention to give my said trustees and those who may be made such, the same dominion and control over said property as I now have" are enabling words inserted to give to the trustees the power to deal fully and expeditiously with the estate, and that they do not release the trustees from the obligation to exercise a sound judgment and a reasonable and prudent discretion in regard to such investment as they may make under the authority given to them.

* * * 59

Decree of Probate Court affirmed.

Matter of HALL.

(Court of Appeals of New York, 1900. 164 N. Y. 196, 58 N. E. 11.)

Appeal from an order of the Appellate Division of the Supreme Court in the Second judicial department, made March 6, 1900, affirming a decree of the Surrogate's Court of the county of New York

⁵⁹ For other decisions justifying investments by trustees in stocks of corporations, see *Lamar v. Micou*, 112 U. S. 452, 5 Sup. Ct. 221, 28 L. Ed. 751 (1884); *Id.*, 114 U. S. 218, 5 Sup. Ct. 857, 29 L. Ed. 94 (1885); *Gray v. Lynch*, 8 Gill (Md.) 403, 420-422 (1849); *McCoy v. Horwitz*, 62 Md. 183 (1884); *Dickinson*, Appellant, 152 Mass. 184, 25 N. E. 99, 9 L. R. A. 279 (1890); *Washington v. Emery*, 57 N. C. 32 (1858); *Peckham v. Newton*, 15 R. I. 321, 4 Atl. 758 (1886); *Boggs v. Adger*, 4 Rich. Eq. (S. C.) 408 (1852).

"All that can be required of a trustee to invest is that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested." *Harvard College v. Amory*, 9 Pick. (Mass.) 446, 461 (1830), per Putnam, J.

Trustees in Massachusetts accordingly have a wide field of investment. See *Lovell v. Minot*, 20 Pick. 116, 32 Am. Dec. 206 (1838); *Brown v. French*, 125 Mass. 410 (1878); *Bowker v. Pierce*, 130 Mass. 262 (1881); *Hunt*, Appellant, 141 Mass. 515, 6 N. E. 554 (1886); *Thayer v. Dewey*, 185 Mass. 68, 69 N. E. 1074 (1904).

adjudging certain investments made by the trustees herein to have been illegal and unauthorized.

CULLEN, J. The question in the case is as to the liability of the appellants as trustees for an investment of twenty-five thousand dollars in the debenture stock of "The Umbrella Company." The authority given the appellants by the will is: "I hereby give my said executors and trustees hereinbefore named full power to reinvest the proceeds of such sale or other act as aforesaid in any security real or personal which they may deem for the benefit of my estate and calculated to carry out the intention of this my last will." The testator himself had been in the umbrella business and by the sixth clause of his will he directed that his interest in the business be closed on the first day of July or the first of January immediately following his decease. The referee acquitted the appellants of any bad faith, but held them liable on the ground that the character of the investment was illegal. This report was confirmed by the surrogate and the surrogate's decree unanimously affirmed by the Appellate Division, which, while it held that under the will the trustees were not limited to what might be called ordinary trust investments, was of opinion that the investment was speculative and hazardous, and, therefore, improper. With this view we agree. As there was a unanimous affirmance below, unless we are prepared to decide that good faith exonerates the trustees from liability, no matter how speculative, hazardous or unwise the investment may have been, we must affirm the judgment and cannot look into the evidence to see how speculative or unreasonable the investment was.

The investment in the case at bar was in the preferred stock of a corporation organized to conduct the manufacture and sale of umbrellas, and formed by the consolidation of several firms at the time engaged in that business. The corporation had no real estate or plant. The preferred or debenture stock was issued for merchandise, fixtures and book accounts of the firms, while the common stock was issued for the supposed good will of those firms. While the money was not paid on an original subscription of stock, but the stock was bought from a holder, still it was during the very first days of the existence of the company and before experience had shown that it could achieve any success or stability. After doing business for a short time the corporation failed and two-thirds of the investment of twenty-five thousand dollars was lost. One of the firms from the consolidation of which the corporation sprang was that of the appellant Hall, in which firm the testator at the time of his decease was a partner. As pointed out in the opinion delivered by Justice Bartlett in the Appellate Division the testator certainly never intended that the money he had directed to be withdrawn from the business should be invested in the same business.

We concede that under the terms of the will the trustees were given a discretion as to the character of the investments they might make,

and that they were not limited to the investments required by a court of equity in the absence of any directions from a testator. The trusts of this will are to provide the testator's children with incomes during their lives, and on their deaths the principal is to go to their issue. The very object of the creation of the trust, was, therefore, the security of the principal, otherwise the testator might better have given the property outright to his children who were the primary objects of his bounty. The range of so-called "legal securities" for the investment of trust funds is so narrow in this state that a testator may well be disposed to grant to his executors or trustees greater liberty in placing the funds of the estate. But such a discretion in the absence of words in the will giving greater authority should not be held to authorize investment of the fund in new, speculative or hazardous ventures. If the trustees had invested in the stock of a railroad, manufacturing, banking, or even business corporation, which, by its successful conduct for a long period of time, had achieved a standing in commercial circles and acquired the confidence of investors, their conduct would have been justified, although the investment proved unfortunate. But the distinction between such an investment and the one before us is very marked. Surely there is a mean between a government bond and the stock of an Alaska gold mine, and the fact that the trustee is not limited to the one does not authorize him to invest in the other.

In our judgment the authority given to the appellants by this will is quite similar to that vested in trustees in the New England states, where the strict English rule as to the investment of trust securities which prevails in this state does not obtain. In *Mattocks v. Moulton*, 84 Me. 545, 24 Atl. 1004, it was held that in the investment of trust funds the trustee must exercise *sound discretion* as well as good faith and honest judgment. The court said: "It will be generally conceded that a mere business chance or prospect, however promising, is not a proper place for trust funds. While, of course, all investments however carefully made, are more or less liable to depreciate and become worthless, experience has shown that certain classes of investments are peculiarly liable to such depreciation and loss. These, of course, would be avoided by every prudent man who is investing his own money with a view to permanency and security rather than chance of profit. A trustee should, therefore, avoid them, even though he sincerely believes a particular investment of that class to be safe as well as profitable." In *Dickinson*, Appellant, 152 Mass. 184, 25 N. E. 99, 9 L. R. A. 279, a trustee was held liable for an investment in Union Pacific railroad stock. It was there said: "Our cases, however, show that trustees in this commonwealth are permitted to invest portions of trust funds in dividend-paying stocks and interest-bearing bonds of private business corporations, *when the corporations have acquired, by reason of the amount of their property, and the prudent management of their affairs, such a reputation that cautious and*

intelligent persons, commonly invest their own money in such stocks and bonds as permanent investments."

Several of the equitable life tenants consented to the investment made by the trustees and are estopped from questioning its propriety. The courts below have so held and have authorized the trustees to retain the shares of such life tenants in the income produced by the sum which the appellants have been directed to pay into the fund on account of the loss on the securities. The decree, however, does not go far enough in this respect, for in certain contingencies these life tenants may be entitled to share in the principal of the fund. The decree should be modified so as to provide that in case any beneficiary who has assented to the investment in the umbrella stock should become entitled to any part of the principal of the fund paid by the trustees, then the trustees may retain such part, and as so modified affirmed, without costs of this appeal to any party.

Judgment accordingly.

WARD v. KITCHEN.

(Court of Chancery of New Jersey, 1878. 30 N. J. Eq. 31.)

Bill for construction of will and for directions.

THE CHANCELLOR [THEODORE RUNYON]. The complainant asks the direction of this Court in the discharge of his duty as trustee under the will of Moses Ward, deceased, and asks, also, for a construction of part of that instrument, and of part of the codicil thereto. By the will the testator, after sundry gifts and provisions, gave one-half of all the residue of his estate, real and personal, to his son, the complainant, and of the remaining half he gave to his daughter Maria the "sum or value of \$6,000 to be at her own disposal," and provided as follows as to the residue of that half:

"Whatever remains of the said last-mentioned half, I direct my executor to invest in productive funds, upon good securities, and to collect and pay over to my said daughter the interest and income thereof, half-yearly, during her natural life."

He provided, also, for the division of the residue between his son and daughter by their mutual agreement, declaring it to be his will that they might, by their own agreement and without sale, by releasing to each other, make division of any and all of the residue of his estate between themselves, so far as they could mutually agree upon the terms of division and the valuation of the property.

By the will he gave to his executor the sum of \$10,000 in trust, to be applied towards defraying the expense of erecting a wing to the asylum building of the Newark Orphan Asylum Association, provided the association should procure the necessary additional funds to build and finish the wing, and actually build and finish it within ten years from the time of his death. He further declared it to be his will, that

until such additional funds were procured, the \$10,000 should be invested in productive funds, upon good and sufficient securities, and the interest and income thereof reinvested in like manner and added to the original sum, and that the whole should, if necessary, be applied to the before-mentioned purpose as soon as the additional fund to be provided by the association should be obtained and the work finished, provided it should be within the ten years. He further declared it to be his will that if funds from other sources should be procured for the purpose of such amount that, they being first applied thereto, any part of his bequest should remain unexpended, then that the residue of his bequest which should so remain unexpended should be invested or put out at interest on good and sufficient securities, and the yearly interest thereof be applied to the general uses and support of the institution. By the codicil, he revoked that bequest, and, in lieu thereof gave to his executor, in trust, for the same purposes and on the same conditions, and subject to the same limitations, one hundred shares of the capital stock of the Newark Gas Light Company, fifty shares of the capital stock of the Newark Banking Company, and fifty shares of the capital stock of the State Bank at Newark; the dividends or profits arising from those stocks to be collected, applied and disposed of in the same manner as, in his will, the interest of the \$10,000 was directed to be applied and disposed of.

The division of the residuary estate, which consisted, in part, of real estate and stock of the Newark Lime Cement Manufacturing Company, the Newark Gas Light Company, the Mechanics National Bank of Newark, and the Newark City National Bank, was made by the complainant and his sister, her husband consenting thereto; and there were therein set off to the complainant, to be held by him, under the trust declared in the will, in respect to his sister's share of the residuary estate, certain shares of those stocks. All of those stocks are valuable, are above par in the market (the Lime and Cement Manufacturing Company's stock very exceptionally so), and all of them are regarded, by many very prudent business men, as excellent investments for their own money. These shares of stock were, in the division, taken at their market value, and they are still held by the complainant, as trustee for his sister at her request, because she, as well as he, regards them as entirely safe, as well as profitable, investments.

The condition on which the gift of stock to the complainant, for the benefit of the Newark Orphan Asylum Association, was made, has been complied with, the wing has been built, and there still remains, in the hands of the complainant, of that bequest, stock of the value of more than \$16,000.

The complainant asks whether the provision of the will as to the division of the residue by him and his sister, is valid, and whether the division so made will be binding, not only as against those who made it, during the lifetime of his sister, but afterwards, as against

all persons claiming as heirs at law of the testator or otherwise. Also, whether he may, without his sister's consent, dispose of the shares of stock which, in that division, were assigned to him to be held in trust as part of her share of the residue, and invest the proceeds in other securities, and whether it is his duty to make such conversion and investment, and whether he will be liable to be held responsible, pecuniarily, for any depreciation in the value of those stocks should he fail to do so. Also, whether he may lawfully continue to hold, in the stock in which it was invested when the testator died and in which it came to the complainant's hands, the unexpended residue of the Orphan Asylum legacy, or whether it is his duty to convert that stock into cash and reinvest the amount in approved securities.

The power given by the testator, to the complainant and his sister, to divide between them, by mutual agreement, his residuary estate, is valid, and a division bona fide, made under it, is binding on all who are affected by or interested in it.

The trust, in respect to all of the daughter's share of the residuary estate, except the \$6,000 which were to be at her own disposal, is to invest it in productive funds, upon good securities, and to collect and pay over to her the interest and income thereof, half-yearly, during her natural life. Under this direction, the trustee would not be at liberty to invest the money in the stocks of banks and manufacturing companies, however exceptionally good, without incurring the responsibility of answering for any loss which might occur to the funds, either in interest or principal, by reason of such investment. If no directions are given in the will as to the conversion and investment of the trust property, the trustee, to be safe, must take care to invest the property in the securities pointed out by the law. *Perry on Trusts*, § 465; *King v. Talbot*, 40 N. Y. 76. Nor will the fact that the testator himself made and approved of the investment, in the absence of express or implied directions in the will, relieve the trustee from responsibility in continuing, permanently, an investment made by the testator which the trustee himself would not be justified in making. *Id.* But the will itself furnishes evidence that the testator, in this case, intended that the investment should not be in stocks. As appears, by the provisions of the codicil changing the bequest to the Orphan Asylum, he thoroughly understood the difference between a direction to invest in "productive funds upon good and sufficient securities" and apply the interest, and the gift of stocks with direction to apply the dividends. In the legacy to Mrs. Brown, and in the gift to the Orphan Asylum, in the will, the same language is used in the direction for investment which is employed in the residuary clause in regard to that part of the residuum which is to be held in trust for his daughter. The direction in the residuary clause is "to invest in productive funds upon good securities, and to collect and pay over to his daughter the interest and income thereof, half-yearly during her natural life." In the provision in the codicil for the Orphan Asylum,

the gift is of specific stocks, the dividends or profits arising from them to be collected, applied and disposed of as in the will the interest of the \$10,000 was directed to be applied and disposed of. The direction to pay the interest or income to his daughter, half-yearly, is indicative of the character of investment which the testator had in contemplation. The direction to invest on good securities will be construed to mean investment on such securities, and on such securities only, as are regarded by the court as proper for the investment of trust funds. If the complainant shall fail so to invest the funds now held by him, in stocks, in trust for his sister, he will be liable to be required to make compensation, at least, for any loss of principal which may occur through depreciation of the stocks.

The gift to the Orphan Asylum stands on a different footing. It is a bequest to the complainant of specific shares of the capital stock of a gas light company and two banks, in trust for the same purposes to which, in his will, the testator had directed the \$10,000 to be applied, "the dividends or profits from the said stocks to be collected, applied and disposed of in the same manner" as in his will the interest of the \$10,000 was directed to be applied and disposed of. The complainant is not at liberty to convert this stock into money (*Neville v. Fortescue*, 16 Sim. 333; *Boys v. Boys*, 28 Beav. 436), unless the depreciation, or threatened depreciation, of it should render it prudent for him to do so in order to protect the trust fund, in which case he must act wisely in the emergency.⁶⁰

MORRIS v. WALLACE.

(Supreme Court of Pennsylvania, 1846. 3 Pa. 319, 45 Am. Dec. 642.)

Appeal from the Court of Common Pleas of Tioga County.

Wallace as "legal representative" of Henrietta, wife of S. Clement, and others, together with the said Henrietta and her husband, the other cestui que trusts, filed a petition in the Common Pleas, praying a citation to appellant, trustee of the widow of W. Patton, to settle his account, exhibiting the true condition of the estate and the manner in which it was disposed of. The account having been filed, was referred to auditors. The question in the cause was, the allowance of a

⁶⁰ In *Matter of Stewart*, 30 App. Div. 368, 371, 51 N. Y. Supp. 1050 (1898), Hatch, J., says: "It may be observed, at the outset, that he who creates a trust requiring the investment of money may direct how the investment shall be made and what securities shall be taken, or he can dispense with any security. *Denike v. Harris*, 84 N. Y. 89."

See, also, *Forbes v. Ross*, 2 Bro. C. C. 430, 2 Cox, Eq. 113 (1788); *Robinson v. Robinson*, 1 De G., M. & G. 247, 261-263 (1851); *Paddon v. Richardson*, 7 De G., M. & G. 563 (1855); *Consterdine v. Consterdine*, 31 Beav. 330 (1862); *Pickard v. Anderson*, L. R. 13 Eq. 608 (1872); *Arnould v. Grinstead*, W. N. 216 (1872); *In re Earl*, 39 W. R. 107 (1890); *Matter of Stewart*, 30 App. Div. 368, 51 N. Y. Supp. 1050 (1898), affirmed 163 N. Y. 593, 57 N. E. 1125 (1900); *Barker's Estate*, 159 Pa. 518, 28 Atl. 365, 368 (1894).

credit claimed for an investment in bank stock of the funds belonging to the trust.

It appeared from the report that Morris was the trustee of certain land, in trust for Henrietta for life, for the support of herself and her minor children, (appellees,) remainder to the children; with power to the trustee to sell at any time, and "invest the proceeds in some productive fund, upon the special trust as aforesaid."

In 1831, the trustee made a conveyance of the land, and took a bond and mortgage, payable in four annual instalments, for a part of the purchase money. In 1840, the amount remaining due was \$659.50. This was assigned, and a draft for the same amount was received for the price. This draft was enclosed by the trustee to the cashier of the Towanda Bank, in a letter, on the 7th December, directing it to be placed to his credit, saying, "I am disposed to invest the amount, say \$650., in your stock, if it can be had at par." On the 13th, thirteen shares were transferred to Morris, for which he was charged \$654.66. In these transactions no reference to his character of trustee appears. The stock was selling at par, and the dividends from November, 1835, to November, 1840, were usually 5 per cent. semi-annually. The cashier testified to various conversations with Morris, in which the value and security was discussed; and that he had given Morris his opinion it was a safe investment; and the prospect was fair of its continuing to pay as it had done. Morris had also stated, he was the agent for a lady who was anxious to dispose of her property and invest in this stock. On cross examination, he stated, the bank had suspended specie payments at the time of the transfer; that it resumed at the same time with others in the State, and again suspended. That in 1843, at a public sale, the shares brought \$2.00.

The auditor disallowed the credit for the amount invested, charged interest on the amount received on the assignment of the mortgage, and also struck out an item of charge for a dividend received in May and November, 1841, and allowed a commission of 5 per cent. on the amount received by the trustee. * * *

The court confirmed the report of the auditor and the rejection of the credit was alleged as error.⁶¹

ROGERS, J. In addition to the views of Judge Conyngham, which we adopt, we think the cause is against the appellant on another ground. The trustee, Mr. Morris, has thought proper to take the transfer of the stock, purchased with the funds of the cestui que trust, in his own name. The nature of the transaction, as he now represents it, nowhere appears on the books of the bank, nor is there any written memorandum; but the case rests on the intention of the trustee, deduced only from his acts and declarations at the time of the investment. Granting that Mr. Morris acted bona fide, which I am not disposed to deny, yet this is a practice which we unequivocally condemn, and have always done so; and if persisted in, it must be at the peril

⁶¹ The statement of facts is abridged.

of the trustee. The rule which makes them personally liable, is intended to prevent fraud, avoiding the temptation to put the profits of the investment in their own pockets, and throw the loss, if any, on others; a temptation, to which those who act in a fiduciary character are exposed, and producing an injustice which may be perpetrated, if allowed, almost without the possibility of detection. It is said, that guardians frequently purchase stock in their own names, with the money of their wards, intending it, at the time, for the exclusive benefit of the latter. If so, the sooner there is an end put to the practice, the better, as it may lead to fraud, and can answer no good purpose whatever. It does not deserve the countenance of a court of justice, for another reason. When the funds of the cestui que trust are invested in the name of the trustee, there is always a difficulty, sometimes insurmountable, in tracing the money to the benefit of the cestui que trust; the consequence of which is, that the funds of the cestui que trust are taken to pay the debt of an insolvent trustee. As this is contrary to every principle of equity, it should be avoided, if possible; we therefore wish it to be distinctly understood, that we regard such an investment as a legal fraud, liable to all the consequences as such, without regard to the intention, or integrity of the trustee, or the honesty and good faith of the particular transaction. It is of the first importance to the cestui que trust, and we think for the benefit of the trustee himself, that their funds should not be intermixed, but should be kept separate and distinct. For unless this rule is observed, it puts the trustee in the power of the cestui que trust, who may, at his option, either insist on the transfer of the stock or other investment, or, if he chooses, charge the trustee with the price and legal interest. The same principle, be it observed, applies to all persons, whether guardians, executors, or others who act in a fiduciary character. Nor does the obiter opinion of Mr. Justice Kennedy, in *Lukens' Appeal*, 7 Watts & S. 48, interfere with the broad principle there laid down, but the case affirms it; for he merely says, "that taking a transfer in the name of a guardian will not itself be sufficient to set aside a settlement made by the ward with the guardian, without other circumstances being shown, from which it may be inferred that the ward had not been fairly dealt with." He, however, nowhere intimates (but the contrary is decided) that it is not such a fraud in law, as the minor can take advantage of at his will and pleasure. And the same thing, in effect, and for the same reason, is ruled in *Myers v. Entriiken*, 6 Watts & S. 44, 40 Am. Dec. 538, where it is decided, that a factor who sells the goods of his principal, consigned to him for that purpose, and takes the notes of the vendee, which he has discounted for his own accommodation, thereby becomes responsible for the amount of sales, in the event of the insolvency of the purchaser. It is ruled, on the ground that the temptation to abuse, afforded by a usage to use the money of the principal, is too strong to be tolerated. So in *Wren v. Thirston*, 11 Vesey, 382, it is said, that an

agent who places his principal's money to his own account with his general banker, takes the risk of the banker's failure; and the reason given, is, that he cannot so deal with it as to be able to treat it as the money of his principal, or his own, according to the event. Nor can it be permitted that the trustee, Mr. Morris, may treat the stock as his own, or as the *cestui que trust's*, as it may fall or rise in value. The decree is affirmed.⁶²

IV. CONSEQUENCES OF FAILURE OF THE TRUSTEE PROPERLY TO INVEST THE TRUST ESTATE.

ROBINSON v. ROBINSON.

(In the Court of Appeal in Chancery, 1851. 1 De Gex, Macnaghten & Gordon, 247.)

Matthew Robinson, by his will dated the 10th of January, 1835, gave all the residue of his personal estate to his executors, upon trust that they should, with all convenient speed, collect and convert the same into money, and should place out and invest the net amount thereof, or continue the same in or upon any of the parliamentary stocks or funds, or of real securities, at interest, and should pay the interest and dividends of the said stocks, funds, and securities to his son Augustin Robinson, for his life; and after his decease then upon trust to pay and transfer the said stocks, funds, and securities to, between, and among the children of the said Augustin Robinson.

The testator died on the 20th of July, 1837, and in the following month of August the will was proved by the executors.

The present bill was filed by the three infant children of Augustin Robinson against the executors, and against their father, for the purpose of having their grandfather's estate administered.

The testator at his death had £5,468. bank stock, £5,182. London Dock stock, and £6,000. Turnpike bonds. The executors paid the interest and dividends to Augustin Robinson until July, 1845. They sold in July, 1845, the bank stock for £11,511. and the London Dock stock for £6,063. and in August the bonds for £5,000., and invested all the proceeds in 3 per cents. Lord Langdale on March 13th, 1849, made a decree charging the executors with the amount of 3 per cents which might have been purchased with the proceeds of the securities had they been sold at the end of one year from the testator's death and declaring that Augustin Robinson was entitled to so much as the dividends on such 3 per cents, had they been purchased, would have amounted to.

⁶² Walker v. Symonds, 3 Sw. 1, 66 (1818); Glenn v. Glenn, 41 Ala. 571 (1868); Matter of Bane, 120 Cal. 533, 52 Pac. 852, 65 Am. St. Rep. 197 (1898); White v. Sherman, 168 Ill. 589, 48 N. E. 128, 61 Am. St. Rep. 132 (1897); Gil-

From this decree Augustin Robinson and the executors appeal.

LORD CRANWORTH, L. J. ⁶³ * * * In the present case it will be observed the executors had the option of investing the trust money at their discretion on real or government securities, and in such a case Sir J. Leach held, in the case of *Marsh v. Hunter* [6 Madd. 295], that trustees, by whose default the money is lost, are chargeable, not with the amount of stock which might have been purchased, but only with the principal money lost, and of course, though the report is not so expressed, with interest thereon.

That decision occurred in 1822. Four years later, namely, in 1826, occurred the case of *Hockley v. Bantock* [1 Russ. 141], before Lord Gifford. There the executors had a similar discretion of investing either on real or government securities; and, on a bill seeking to charge them with balances improperly retained in their hands, Lord Gifford directed an inquiry as to the price of £3. per cents. at the several times when the balances ought to have been invested. Such an inquiry would have been improper if the executors could not have been charged with the value of the stock; and the case, therefore, is an authority that, in the opinion of Lord Gifford, they might be so charged. Notwithstanding this last case, however, Sir J. Leach adhered to his own view of the law, and acted on it in a non-reported case of *Gale v. Pitt* at the Rolls on the 10th of May, 1830.

Lord Gifford's authority has been followed by Lord Langdale in several reported cases, to which we were referred in the argument, namely, *Watts v. Girdlestone* [6 Beav. 188], *Ames v. Parkinson* [7 Beav. 379], and *Ouseley v. Anstruther* [10 Beav. 456].

On the other hand, Sir James Wigram, in *Shepherd v. Moulds* [4 Hare, 500], and my learned brother, in *Rees v. Williams* [1 De G. & S. 314], have refused to follow the authority of *Hockley v. Bantock*, and have acted on the earlier case of *Marsh v. Hunter*. In this irreconcilable conflict of authority, it is absolutely necessary for us to look to the principles on which the doctrine rests.

There can be no doubt but that, where trustees improperly retain balances in their hands, or, by want of due care, cause or permit trust money to be lost, they are chargeable with the sums so retained or lost, and with interest on them at £4. per cent. ⁶⁴

bert v. Welsch, 75 Ind. 557 (1881); *State v. Greensdale*, 106 Ind. 364, 6 N. E. 926, 55 Am. Rep. 753 (1885); *State v. Roeper*, 82 Mo. 57 (1884); *Knowlton v. Bradley*, 17 N. H. 458, 43 Am. Dec. 609 (1845); *Stanley's Appeal*, 8 Pa. 431, 49 Am. Dec. 530 (1848); *Royer's Appeal*, 11 Pa. 36 (1849); *Noble's Estate*, 178 Pa. 460, 35 Atl. 859 (1896); *Carr's Estate*, 24 Pa. Super. Ct. 369 (1904).

⁶³ The statement of facts is abridged, and only a part of the opinion is given.

⁶⁴ NEGLIGENCE.—*Rocke v. Hart*, 11 Ves. 58 (1805); *Tebbs v. Carpenter*, 1 Madd. 290 (1816); *Johnson v. Prendergast*, 28 Beav. 480 (1860); *In re Evans' Estate*, W. N. 205 (1876); *Gilbert v. Price*, W. N. 117 (1878); *Gilroy v. Stephens*, 51 L. J. Ch. 834 (1882); *Clapp v. Woodall*, 38 Sol. J. 487 (1894).

ACTIVE MISCONDUCT.—In England a distinction is generally drawn between negligence and active misconduct on the part of a trustee. In the case of negligence he is charged with 4 per cent. interest, and in the case of active

It may also be true that, where trustees have in their hands, money which they are bound to secure permanently for the benefit of their cestuis que trustent, then in the absence of express authority or direction to the contrary, they are generally bound to invest the money in the £3. per cents. This obligation is not the result of any positive law, but has been imposed on trustees by the court as a convenient rule, affording security to the cestuis que trustent and presenting no possible difficulty to the trustees.

Suppose then that trustees have improperly retained in their hands balances which they ought to have invested in £3. per cents., either by reason of this general rule of the court, or because such a duty was expressly imposed upon them by the terms of the trust, or have by

misconduct with 5 per cent. interest. *Piety v. Stace*, 4 Ves. Jr. 620 (1799); *Pocock v. Reddington*, 5 Ves. Jr. 794 (1801); *Heathcote v. Hulme*, 1 J. & W. 122 (1819); *Crackelt v. Rethune*, 1 J. & W. 586 (1820); *Bick v. Motly*, 2 Myl. & K. 313 (1835); *Munch v. Cockerell*, 5 Myl. & Cr. 178, 220, 222 (1839); *Penny v. Avison*, 3 Jur. N. S. 62 (1856); *Mayor, etc., v. Murray*, 7 De G., M. & G. 497, 515, 519 (1856); *Burdick v. Garrick*, 5 Ch. App. Cas. 233, 241, 243 (1869); *Ex parte Ogle*, 8 Ch. App. Cas. 711 (1873); *Hooper v. Hooper*, W. N. 174 (1874); *Price v. Price*, 42 L. T. R. 626 (1880); *Re Jones*, 49 L. T. R. 91 (1883); *Vyse v. Foster*, 8 Ch. App. Cas. 309, 337 (1872).

In the following cases, however, of active misconduct, only 4 per cent. interest was given: *Perkins v. Baynton*, 1 Bro. C. C. 375 (1784); *In re Hilliard*, 1 Ves. Jr. 89 (1790); *Browne v. Southouse*, 3 Bro. C. C. 107 (1790); *Younge v. Combe*, 4 Ves. Jr. 101 (1798); *Attorney General v. Alford*, 4 De G., M. & G. 843 (1855); *Fletcher v. Green*, 33 Beav. 426 (1864); *In re Emmet's Estate*, 17 Ch. Div. 142 (1881).

Originally a trustee using trust funds for his own benefit was charged no interest. *Grosvenor v. Cartwright*, 2 Ch. Cases, 21 (1679); *Linch v. Cappy*, 2 Chy. Cas. 35 (1680); *Bromfield v. Wytherley*, Prec. in Chy. 505 (1718); *Ratcliffe v. Graves*, 1 Vern. 196 (1683); *Ratcliff v. Graves*, 2 Chy. Cas. 152; *Corsellis v. Lake*, 1 Vern. 197, note 1 (1756). See, also, *Adams v. Gale*, 2 Atk. 106 (1740); *Child v. Gibson*, 2 Atk. 603 (1743).

In the United States the distinction between negligence and active misconduct is in general disregarded, and simple interest at the legal rate charged. In *re Thorp*, 4 N. Y. Leg. Obs. 377, Fed. Cas. No. 14,002 (1846); *Bourne v. Maybin*, 3 Woods, 724, Fed. Cas. No. 1,700 (1877); *Bryant v. Craig*, 12 Ala. 354 (1847); *Nunn v. Nunn*, 66 Ala. 35 (1880); *Eppinger v. Canepa*, Exr., 20 Fla. 262 (1883); *Hough v. Harvey*, 71 Ill. 72 (1873); *Lehmann v. Rothbarth*, 111 Ill. 185 (1884); *White v. Sherman*, 168 Ill. 589, 48 N. E. 128, 61 Am. St. Rep. 132 (1897); *Rochester v. Levering*, 104 Ind. 562, 4 N. E. 203 (1885); *Hughes v. Smith*, 2 Dana (Ky.) 251 (1834); *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11, 18 Amr. Dec. 250 (1826); *Comegys v. State*, 10 Gill & J. (Md.) 175 (1838); *Glenn's Ex'rs v. Cockey*, 16 Md. 446 (1860); *Smith v. Darby*, 39 Md. 268 (1873); *Gott v. State, etc.*, 44 Md. 319 (1875); *McKim v. Hibbard*, 142 Mass. 422, 8 N. E. 152 (1886); *Forbes v. Ware*, 172 Mass. 306, 52 N. E. 447 (1899); *Moyer v. Fletcher*, 56 Mich. 508, 23 N. W. 198 (1885); *Perrin v. Lepper*, 72 Mich. 454, 40 N. W. 859 (1888); *Judd v. Dike*, 30 Minn. 380, 15 N. W. 672 (1883); *Crosby v. Merriam*, 31 Minn. 342, 17 N. W. 950 (1883); *St. Paul Trust Co. v. Kittson*, 62 Minn. 408, 65 N. W. 74 (1895); *Davis v. Swedish American National Bank*, 78 Minn. 408, 80 N. W. 953, 81 N. W. 210, 79 Am. St. Rep. 400 (1899); *St. Paul Trust Co. v. Stong*, 85 Minn. 1, 88 N. W. 256 (1901); *Ames v. Scudder*, 11 Mo. App. 168 (1881), affirmed 83 Mo. 189 (1884); *Knowlton v. Bradley*, 17 N. H. 458, 43 Am. Dec. 609 (1845); *Stark v. Gamble*, 43 N. H. 465 (1862); *French v. Currier*, 47 N. H. 88 (1866); *Pickering v. De Rochemont*, 60 N. H. 179 (1880); *Aldridge v. McClelland*, 36 N. J. Eq. 288 (1882); affirmed 38 N. J. Eq. 279 (1884); *Dunscorn v. Dunscorn*, 1 Johns. Ch. (N. Y.) 508, 7 Am. Dec. 504 (1815); *Manning v. Manning*, 1 Johns. Ch.

neglect allowed such balances to be lost, what, in such a case, is the right of the cestuis que trustent?

In all such cases, or at all events, in all such cases where there has been an express trust to invest in £3. per cents., the cestuis que trustent have the option of charging the trustee either with the principal sum retained and interest, or with the amount of £3. per cents. which would have arisen from the investment if properly made.⁶⁵ The doctrine of the court where it applies this rule is that the trustee shall not profit by his own wrong. If he had done what he was bound to do, a certain amount of £3. per cents. would have been forthcoming for the cestuis que trustent. And therefore if called on to have such £3. per cents. forthcoming, he is bound to do so; just as, in ordinary cases, every wrongdoer is bound to put the party injured, so far as the

(N. Y.) 527 (1815); *Brown v. Rickets*, 4 Johns. Ch. (N. Y.) 303, 8 Am. Dec. 567 (1820); *De Peyster v. Clarkson*, 2 Wend. (N. Y.) 77 (1828); *Garniss v. Gardiner*, 1 Edw. Ch. (N. Y.) 128 (1831); *Utica Ins. Co. v. Lynch*, 11 Paige (N. Y.) 520 (1845); *Duffy v. Duncan*, 32 Barb. (N. Y.) 587 (1860); affirmed 35 N. Y. 187 (1866); *Rundle v. Allison*, 34 N. Y. 180 (1866); *King v. Talbot*, 40 N. Y. 76 (1869); *Lent v. Howard*, 89 N. Y. 169 (1882); *Cook v. Lowry*, 95 N. Y. 103 (1884); *Thorn v. Garner*, 42 Hun (N. Y.) 507 (1886); *Morgan v. Morgan*, 4 Dem. Sur. (N. Y.) 353 (1886); *In re Newcomb* (D. C.) 32 Fed. 826 (1887), New York law; *Butler v. Jarvis*, 51 Hun, 248, 4 N. Y. Supp. 137 (1889); *Matter of Myers*, 131 N. Y. 409, 30 N. E. 135 (1892); *In re Barnes*, 4 Misc. Rep. 136, 23 N. Y. Supp. 600 (1893); *Matter of Reed*, 45 App. Div. 196, 61 N. Y. Supp. 50 (1899); *Armstrong v. Miller*, 6 Ohio, 119 (1833); *Estate of McCall*, 1 Ashm. (Pa.) 357 (1831); *Fox v. Wilcocks*, 1 Bin. (Pa.) 194, 2 Am. Dec. 433 (1806); *Say's Ex'rs v. Barnes*, 4 Serg. & R. (Pa.) 112, 8 Am. Dec. 679 (1818); *Estate of Dyott*, 2 Watts & S. (Pa.) 557 (1841); *Lane's Appeal*, 24 Pa. 487 (1855); *Breneman v. Frank*, 28 Pa. 475 (1857); *Landis v. Scott*, 32 Pa. 495 (1859); *Pennypacker's Appeal*, 41 Pa. 494 (1862); *Ihmsen's Appeal*, 43 Pa. 431 (1862); *Hess's Estate*, 68 Pa. 454 (1871); *Conrad's Appeal*, 11 Wkly. Notes Cas. (Pa.) 521 (1882); *Whitecar's Estate*, 147 Pa. 368, 23 Atl. 575 (1892); *Black v. Blakely*, 2 McCord, Eq. (S. C.) 1 (1827); *Wright v. Wright*, 2 McCord, Eq. (S. C.) 185 (1827); *Turney v. Williams*, 7 Yerg. (Tenn.) 172 (1834); *Cannon v. Apperson*, 14 Lea (Tenn.) 553 (1885); *Murchison v. Payne*, 37 Tex. 305 (1872-1873); *Reed v. Timmins*, 52 Tex. 84 (1879); *McCloskey v. Gleason*, 56 Vt. 264, 48 Am. Rep. 770 (1883); *Miller v. Beverleys*, 4 Hen. & M. (Va.) 415 (1809); *Cavendish v. Fleming*, 3 Munf. (Va.) 198 (1812); *Ker's Ad'm v. Snead*, 11 Monthly L. R. 217 (1847); *Cogbill v. Boyd*, 79 Va. 1 (1884); *Guardianship of Thurston*, 57 Wis. 104, 15 N. W. 126 (1883); *Olsen v. Thompson*, 77 Wis. 666, 47 N. W. 20 (1890); *Taylor v. Hill*, 87 Wis. 669, 58 N. W. 1055 (1894).

In Wilmerding v. McKesson, 103 N. Y. 329, 8 N. E. 665 (1886), and also in *Bruen v. Gillet*, 115 N. Y. 10, 21 N. E. 676, 4 L. R. A. 529, 12 Am. St. Rep. 764 (1889), equitable interest, so called, 5 per cent. was charged, instead of 6 per cent., the legal rate.

In the following cases, where the trustee had misapplied trust funds under a mistake as to his rights, but without profit to himself, no interest was charged: *Saltmarsh v. Barrett*, 31 Beav. 349 (1862); *Clauser's Estate*, 84 Pa. 51, 54 (1877); *Pulliam v. Pulliam* (C. C.) 10 Fed. 53, 60-69 (1881). This doctrine, however, is not generally adopted. See *Mousley v. Carr*, 4 Beav. 49 (1841); *Attorney General v. Köhler*, 9 H. L. C. 654 (1861); *Ingles v. Beaty*, 2 Ont. App. 453 (1878); *In re Hulkes*, L. R. 33 Ch. Div. 552 (1886); *Moody, Adm'r, v. Hemphill*, 71 Ala. 169 (1881); *Crowder v. Shackelford*, 35 Miss. 321 (1858); *Jones v. Ward*, 10 Yerg. (Tenn.) 160 (1836).

⁶⁵ *Bate v. Hooper*, 5 De G., M. & G. 338, 345 (1855); *Pride v. Fooks*, 2 Beav. 430 (1840); *Re Lasak's Estate* (Sur.) 20 N. Y. Supp. 74 (1890).

nature of the case allows, in the same situation in which he would have stood if the wrong had not been done. All this is very intelligible.

Again, suppose the trustee has not only improperly retained balances, but has lost or used them in trade. There the cestui que trust has the right, if it is for his interest to do so, to charge the trustee not with the sum retained and interest, but with all the profits made in the trade.⁶⁶

The ground on which this right rests is this. The employment in trade is unwarrantable; but if it turns out to have been profitable, the cestui que trust has a right to follow the money, as it is said, into the trade. In such a case, the trade profits have in fact been produced by the employment of the money of the cestui que trust; and it would be manifestly unjust to permit the trustee to rely on his own misconduct in having exposed the funds to the risks of trade, as a reason for retaining the extra profit beyond interest for his own benefit. Even where no such extra profits have been made, the cestui que trust is in general at liberty to charge his trustee, who has allowed the trust money to be employed in trade, with interest at £5. per cent., that being the ordinary rate of interest paid on capital in trade.

⁶⁶ Anonymous, 2 Ves. Sr. 629 (1755); Palmer v. Mitchell, 2 Myl. & K. 672, note (1809); Burden v. Burden, 1 J. & W. 134 (cited) (1813); Ex parte Watson, 2 V. & B. 414 (1814); Heathcote v. Hulme, 1 J. & W. 122 (1819); Docker v. Somes, 2 Myl. & K. 655 (1834); Willett v. Blandford, 1 Hare, 253 (1841); Wedderburn v. Wedderburn, 22 Beav. 84 (1855); Townend v. Townend, 1 Giff. 201 (1859); Flockton v. Bunning, 8 Ch. App. Cas. 323, note (1868); Barney v. Saunders, 16 How. 535, 543, 14 L. Ed. 1047 (1853); Whitney v. Peddicord, 63 Ill. 249 (1872); Ringgold v. Ringgold, 1 H. & G. 11, 80 (1826); Heath v. Waters, 40 Mich. 457 (1879); McKnight's Ex'rs v. Walsh, 23 N. J. Eq. 136 (1872); affirmed 24 N. J. Eq. 498 (1873); Schieffelin v. Stewart, 1 John. Ch. (N. Y.) 620, 7 Am. Dec. 507 (1815); Robinett's Appeal, 36 Pa. 174 (1860); Norris's Appeal, 71 Pa. 106 (1872); Baker's Appeal, 120 Pa. 33, 13 Atl. 487 (1888); Hazard v. Durant, 14 R. I. 25 (1882).

COMPOUND INTEREST.—Formerly compound interest was not allowed against a trustee simply because he invested trust funds in trade. Treves v. Townshend, 1 Bro. C. C. 384, 1 Cox, Eq. 50 (1784); Rocke v. Hart, 11 Ves. Jr. 58 (1805); Heathcote v. Hulme, 1 J. & W. 122, 134 (1819); Brown v. Sansome, McClel. & Y. 427 (1825); Sutton v. Sharp, 1 Russ. 146 (1826); Moons v. De Bernales, 1 Russ. 301 (1826); Attorney General v. Solly, 2 Sim. 518 (1829); Docker v. Somes, 2 Myl. & K. 655 (1834); Mousley v. Carr, 4 Beav. 49, 53 (1841); Westover v. Chapman, 1 Coll. 177 (1844). But now the cestui que trust has the option of charging the trustee with the fund invested and the profits made, or with compound interest instead of profits; it being presumed that the profits are equal to compound interest. The burden of showing to the contrary is on the trustee. Walker v. Woodward, 1 Russ. 107 (1826); Heighington v. Grant, 1 Phillips, 600 (1844); Jones v. Foxall, 15 Beav. 388 (1852); Williams v. Powell, 15 Beav. 461 (1852); Penny v. Avison, 3 Jur. N. S. 62 (1856); Saltmarsh v. Barrett, 31 Beav. 349, 350 (1862); Burdick v. Garrick, 5 Ch. App. Cas. 233, 241 (1870); Inglis v. Beatty, 2 Ont. App. 453 (1878); Barney v. Saunders, 16 How. 535, 542, 14 L. Ed. 1047 (1853); Hook v. Payne, 14 Wall. 252, 20 L. Ed. 887 (1871); Estate of Stott, 52 Cal. 403 (1877); Estate of Clark, 53 Cal. 355 (1879); Merrifield v. Longmire, 66 Cal. 180, 4 Pac. 1176 (1884); In re Eschrich, 85 Cal. 98, 24 Pac. 634 (1890); In re Thompson, 101 Cal. 349, 35 Pac. 991, 36 Pac. 98, 508 (1894); Estate of Cousins, 111 Cal. 441, 44 Pac. 182 (1896); In re Clary, 112 Cal. 292, 44 Pac. 569 (1896); Guardianship of Dow, 133 Cal. 446, 65 Pac. 890 (1901); Gassell

This right depends on principles the same, or nearly the same, as those which enable the cestui que trust to adopt the investment, and take the profits actually made.

But the grounds on which, in all these cases, the right of election in the cestui que trust rests, wholly fail in a case where a trustee, having an option to invest either in £3. per cents., or on real security, neglects his duty and carelessly leaves the trust funds in some other state of investment. In such a case, the cestui que trust cannot say to the trustee, If you had done your duty I should now have had a certain sum of £3. per cents., or the trust fund would now consist of a certain amount of £3. per cents. It is obvious that the trustee might have duly discharged his duty, and yet no such result need have ensued.

Where a man is bound by covenants to do one of two things, and does neither, there in an action by the covenantee, the measure of damages is in general the loss arising by reason of the covenantor having failed to do that which is least, not that which it most, beneficial to the covenantee; and the same principle may be applied by

v. Gassell, 147 Cal. 510, 82 Pac. 42 (1905); Fall v. Simmons, 6 Ga. 265 (1849); Johnson's Adm'r's v. Hedrick, 33 Ind. 129, 5 Am. Rep. 191 (1870); Clark v. Anderson, 10 Bush (Ky.) 99 (1873); Page's Ex'r v. Holman, 82 Ky. 573 (1885); Ringgold v. Ringgold, 1 Har. & G. (Md.) 11, 80, 18 Am. Dec. 250 (1826); Diferenderfer v. Winder, 3 Gill & J. (Md.) 311 (1831); Perrin v. Lepper, 72 Mich. 454, 555, 556, 40 N. W. 859 (1888); In re Davis, Ex'r, 62 Mo. 450 (1876); Williams, Adm'r, v. Heirs of Petticrew, 62 Mo. 460, 472 (1876); Estate of Camp, 6 Mo. App. 563 (1879); Scott v. Crews, 72 Mo. 261 (1880); Bobb v. Bobb, 89 Mo. 411, 421, 4 S. W. 511 (1886); Assignment of Murdoch & Dickson, 129 Mo. 488, 31 S. W. 942 (1895); Crowder v. Shackelford, 35 Miss. 321, 359-361 (1858); Troup v. Rice, 55 Miss. 278 (1877); McKnight's Ex'rs v. Walsh, 23 N. J. Eq. 136, 146-148 (1872); affirmed 24 N. J. Eq. 498 (1873); Schieffelin v. Stewart, 1 John. Ch. (N. Y.) 620, 7 Am. Dec. 507 (1815); Garniss v. Gardiner, 1 Edw. Ch. (N. Y.) 128 (1831); Utica Ins. Co. v. Lynch, 11 Paige (N. Y.) 520 (1845); Hannahs' Ex'r v. Hannahs, 68 N. Y. 610 (1877); Berwick v. Halsey, 4 Redf. Sur. (N. Y.) 18 (1878); Cook v. Lowry, 95 N. Y. 103 (1884); Matter of Reed, 45 App. Div. 196, 203, 61 N. Y. Supp. 50 (1899); Farwell v. Steen, 46 Vt. 678 (1874); McCloskey v. Gleason, 56 Vt. 264, 282, 283, 48 Am. Rep. 770 (1883); Re Hodge's Estate, 66 Vt. 70, 28 Atl. 663, 44 Am. St. Rep. 820 (1893).

In some jurisdictions compound interest is allowed for mere misconduct. Price, Guardian, v. Peterson, 38 Ark. 494 (1882); Hough v. Harvey, 71 Ill. 72 (1873); Jennison v. Hapgood, 10 Pick. (Mass.) 77, 104 (1830); Miller v. Congdon, 14 Gray (Mass.) 114 (1859); Elliott v. Sparrell, 114 Mass. 404 (1874); Salisbury v. Colt, 27 N. J. Eq. 492 (1875); Roberts' Appeal, 92 Pa. 407 (1880); Frost v. Winston, 32 Mo. 489 (1862).

TRUST FOR ACCUMULATION.—Compound interest is charged against the trustee failing to accumulate income, where such accumulation is directed. Raphael v. Boehm, 11 Ves. Jr. 92 (1805); 13 Ves. Jr. 407 (1807); 13 Ves. Jr. 590 (1807); Knott v. Cottee, 16 Beav. 77 (1852); Townsend v. Townsend, 1 Giff. 201 (1859); In re Emmet's Estate, L. R. 17 Ch. Div. 142 (1881); Rowan v. Kirkpatrick, 14 Ill. 1 (1852); Bond v. Lockwood, 33 Ill. 212 (1864); In re Steele et al., Guardians, 65 Ill. 322 (1872); Hughes v. People, 111 Ill. 457 (1885); Clemens v. Caldwell, 7 B. Mon. (Ky.) 171 (1846); Voorhees v. Stoothoff, 11 N. J. Law, 145 (1829); Perrine v. Petty, 34 N. J. Eq. 193 (1881); English v. Harvey, 2 Rawle (Pa.) 305 (1830); Bowles v. Executors of Drayton, 1 Desaus. (S. C.) 489, 1 Am. Dec. 689 (1796); Edmonds v. Crenshaw, Harp. Eq. (S. C.) 224 (1824).

analogy to the case of a trustee failing to invest in either of two modes equally lawful by the terms of the trust.

It was contended at the bar that, in such a case, the trustee has by his neglect lost his right of election between the two modes of investment; that he was always bound by the trust to exercise his discretion in the mode most beneficial for the objects of the trust; and that having omitted to do so at the time when the option was open to him, he can no longer do it when he is called to account for his neglect, and when he can no longer exercise an unbiased and impartial option. The fallacy of this argument consists in assuming that, in the case supposed, the trustee is called on to exercise any option at all. He is not called on to exercise an option retrospectively; but is made responsible for not having exercised it at the proper time, for not having made one of two several kinds of investment. And a reason for his being in such case chargeable only with the money which should have been invested, and not with the £3. per cents. which might have been purchased, is, that there never was any right in the *cestui que trust* to compel the purchase of £3. per cents. The trustee is answerable for not having done what he was bound to do, and the measure of his responsibility should be what the *cestui que trust* must have been entitled to, in whatever mode that duty was performed.

The ground on which Lord Langdale proceeded in the several cases before him appears to have been that when the trustee has failed to perform his duty in either of the ways which were open to him, the *cestuis que trustent* may then exercise an option which certainly did not belong to them by the terms of the trust; i. e. that if the trustee has failed to exercise his option, then the right of election passes to the *cestuis que trustent*, although not given to them by the instrument creating the trust. But on what foundation does this supposed right of the *cestuis que trustent* to exercise such an option rest? No such right can be derived from the principle that the *cestuis que trustent* are entitled to compel the trustee to do what he was bound to do, for he was not bound to purchase £3. per cents. Nor from the principle that they may follow the trust funds into their actual state of investment, or charge a higher rate of interest in consequence of such investment, for the foundation of the complaint is, that the funds have not been invested at all. The only plausible foundation for the doctrine which occurs to us is this: The trustee was bound to exercise his option not capriciously, but in the mode likely to be most beneficial to the *cestuis que trustent*. And their interests appear in the result to be best served by requiring an investment in £3. per cents. But this reasoning seems founded on a fallacy. The selection of the £3. per cents. is thus made to depend not on any option in their favor which the trustee was originally bound to exercise; but on the accident of their subsequent rise in value, a principle of decision from which, with all deference, we differ. If such a principle were to be applied, then, as it was well put at the bar, if in the present case there had been a discre-

tion to invest in railway shares, the cestuis que trustent might perhaps now fix on the shares of some particular railway which has risen very highly in value, and say the investment might have been, and so ought to have been, on that particular security.

On the whole, therefore, we cannot discover any such right of option as is contended for in the cestuis que trustent, not on the ground of their being entitled by the terms of the trust to compel the trustee to make an investment in £3. per cents., for no such obligation was imposed on him—not on the ground of their being entitled to adopt or insist on any actual investment, for no investment was made—not on the ground of any obligation on the part of the trustees to select the £3. per cents. as the most beneficial mode of investment, for the advantage of the £3. per cents. arises from their accidental and subsequent increase in value, and not from any necessary superiority at the time when the investment ought to have been made.

The consequence is, that the decree should, we think, be varied by striking out so much of it as declares that the produce arising from the sale of the bank stock, London Dock stock and sewers bonds ought to have been invested in £3. per cents., and that the defendant Augustin Robinson was entitled to so much only of the income arising from those funds from the end of one year after the testator's decease, as should not exceed the amount of the dividends which would have accrued due on the £3. per cents. if purchased; and it must be declared that he is entitled from the end of the first year after the testator's decease up to the time of the sales and investments in £3. per cents. in July and August, 1845, to interest at £4. per cent. on the amount which the Master has found that those funds would have produced at the end of the year, not exceeding the amount of interest and dividends actually produced. * * *⁶⁷

BAKER v. DISBROW.

(Supreme Court of New York, General Term, Second Department, 1879.
18 Hun, 29.)

Appeal from a decree by the Surrogate of the County of Westchester, entered upon the final settlement of the accounts of the respondents, as executors of Philena Disbrow, deceased.

Philena Disbrow died testate in New Rochelle, in March, 1865, seized of a house and lot there and possessed of personal estate amounting to \$503.87. After directing payment of her debts and funeral expenses, she devised and bequeathed the use of her real and personal estate to the children of Cassandra Baker, wife of Edward T. Baker, during the life of Cassandra Baker and at her death, to her children equally. The executors were empowered to sell the real es-

⁶⁷ Knott v. Cottee, 16 Beav. 77 (1852); Andrew v. Schmitt, 64 Wis. 664, 26 N. W. 190 (1885).

tate and "invest the proceeds of such sale on good bond and mortgage, or in or upon other good and sufficient security."

After payment of funeral charges and debts, \$106.10 of personal estate remained. In April, 1866, the house and lot in New Rochelle were sold and \$4,256.08, after payment of expenses, remained in the hands of the executors. On April 1, 1869, the executors bought a farm in East Chester paying for it all of the trust funds, namely, \$4,307.58, and \$1,500 contributed by the brothers of Mrs. Baker. In a few weeks this farm was exchanged for a house and lot in New York City, the executors receiving on the exchange about \$2,000. In June, 1870, this property was sold and the executors had \$9,449.86, of which \$6,000 was on bond and mortgage. Of this \$3,000 was invested in a mortgage on property in Fordham. Subsequently \$1,000 more was advanced and a deed of the property taken and \$500 spent for furniture and improvements. In 1871 a part of the Fordham land was exchanged for a farm in New Jersey on which were two mortgages, one of \$4,000 and one of \$6,000. The executors paid \$2,600 and assumed both mortgages. In October, 1873, the balance of the Fordham property was sold for \$2,500. The executors paid on the New Jersey farm \$2,600 in interest on the mortgages and in 1874 \$2,000 on account of the second mortgage and \$550 in satisfaction of a judgment against Mr. and Mrs. Baker. Subsequently the second mortgage was foreclosed and the property sold for less than the two mortgages to the plaintiff. Up to the time of the exchange for the New Jersey farm the trust fund had reached to \$13,450. The result of all these speculations was to diminish the fund to \$1,394.04.

GILBERT, J.⁶⁸ A breach of trust having been shown, the only question before us is in what way the trustees and executors are to be charged. It appears that up to October, 1871, the unauthorized dealings with the trust funds had produced large profits, but that in consequence of similar dealings, after that date, all of those profits and some of the principal of the fund had been lost. The trust was "to invest on good bond and mortgage, or in or upon other good and sufficient security." No particular mode of investment, except upon bond and mortgage, was prescribed. The trustees invested in the purchase of real estate. In such a case the rule seems to be that the cestui que trust has his election to take the fund and legal interest thereon, or the fund and all the profits that have been made upon the fund. If the cestui que trust elects to take the profits he must take them during the whole period, subject to all the losses of the business; he cannot take profit for one period and interest for another. Hill on Trusts (2d Am. Ed.) 534; Perry on Trusts, §§ 470-472, and cases cited; Heathcote v. Hulme, 1 J. & W., 122. The trustee cannot be charged with a greater amount of profits than he has actually received. Jones v. Foxall, 15 Beav. 388-395; Utica Ins. Co. v. Lynch, 11

⁶⁸ The statement of facts is abbreviated from 3 Redf. Sur. (N. Y.) 348 (1878).

Paige 523, et seq. The principle is that, in the management of a trust, the trustee may lose but cannot gain. If by any improper use of the fund profits have been realized, they must be accounted for, and if no profits have been made, he is to be charged with the fund and interest thereon. The profits which may have accrued at any particular time are a mere accretion to the fund, and the trustee can be charged with them only upon the ground that he has appropriated them to his own use. If upon an accounting, in respect to the fund during the entire period of the trust, it appears that no profits have been made, the trustee is chargeable with interest only. The improper investment is considered as against the trustee himself, as equivalent to no investment. But in favor of the cestui que trust it gives an option to claim either the investment made, or the replacement of the original fund, with interest, according as the one or the other may be most for his benefit. *Lane v. Dighton*, Amb. 409; *Marsh v. Hunter*, 6 Mad. 295; *Robinson v. Robinson*, 1 De G., M. & G. 256; *Docker v. Somes*, 2 M. & K. 655; *supra*, cases cited.

The Surrogate appears to have been governed by the rule stated, and his decree should be affirmed, with costs to be paid out of the estate.

BARNARD, P. J., and DYKMAN, J., concurred.

Decree of Surrogate affirmed, with costs.⁶⁹

SECTION 5.—THE TRUSTEE'S DUTY AS TO THE CUSTODY OF THE TRUST ESTATE.

MORLEY v. MORLEY.

(In Chancery, before Finch, Lord Chancellor, 1678. 2 Chancery Cases, 2.)

The defendant was trustee for the plaintiff, an infant, and received for him £40. in gold; a servant of the defendant living in the house with him robbed his master of £200. and the £40. out of his house. The robbery, viz. that the defendant was robbed of money, was proved; the sum of £40. was proved by only the defendant's oath.

LORD CHANCELLOR. He was to keep it but as his own, and allowed it on account; so in case of a factor; so in case of a person robbed, for he cannot possibly have other proof.⁷⁰

⁶⁹ See *Heathcote v. Hulme*, 1 J. & W. 122 (1819).

⁷⁰ *Jobson v. Palmer*, L. R. (1893) 1 Ch. 71 (1892); *United States v. Thomas*, 15 Wall. 337, 343, 21 L. Ed. 89 (1872); *Newsom v. Thornton*, 66 Ala. 311 (1880); *Lehman v. Robertson*, 84 Ala. 489, 4 South. 728 (1887); *State v. Meagher*, 44 Mo. 356, 100 Am. Dec. 298 (1869); *Fudge v. Durn*, 51 Mo. 264 (1873); *Stevens v. Gage*, 55 N. H. 175, 20 Am. Rep. 191 (1875); *Furman v. Coe*, 1 Caines Cas. (N. Y.) 96 (1804); *Carpenter v. Carpenter*, 12 R. I. 544, 34 Am. Rep. 716 (1880); *Mikell v. Mikell*, 5 Rich. Eq. (S. C.) 220 (1853); *McKnight v. McKnight*, 10 Rich. Eq. (S. C.) 157 (1858).

CORNWELL v. DECK.

(Supreme Court of New York, General Term, Fourth Department, 1876.
8 Hun, 122.)

Appeal from a decree of the Surrogate of the County of Steuben, on a final accounting, refusing to allow the administratrix credit for moneys of the estate stolen, on account of negligence. The defendants were creditors of the estate, which was insolvent.

The appellant is the widow of one A. Cornwell and was appointed the administratrix of his estate, April 16, 1872. Deceased was a merchant at Woodhull. The estate consisted of a stock of goods in the store there, besides accounts and notes. The administratrix, who was an old lady, employed her son to sell the goods at retail and collect the accounts. She, with her family, occupied rooms adjoining the store, and kept the money collected, in a trunk in a bed-room occupied by her crippled son. On the 20th of March, 1873, the sum of about \$1,660 belonging to the estate, was stolen from said trunk and never recovered.

The nearest bank was twelve miles from where she lived, at which her husband had had a bank book, and where he used to deposit money, and draw checks. The place of deposit of the money was known to several persons, and the money, or a portion of it, had been kept there for nearly a year.

E. DARWIN SMITH, J. Whether the appellant is liable for the loss of the \$1,660, money belonging to the estate and stolen from a trunk in her possession, is the question presented upon this appeal.

In Chambersburg Savings Fund Ass'n's Appeal, 76 Pa. 203, the rule is stated by Mercur, J., in respect to the liability of trustees, as follows: "It is well settled that a trustee shall not be surcharged by a court of equity for a loss which has occurred in case he has exercised common skill, common prudence and common caution, but for supine negligence or wilful default, he shall be held responsible."

What is supine negligence must depend upon the nature of the property to a great extent. While it might not be negligent to leave furniture and ordinary personal property in any room in an occupied dwelling house, it would certainly be very improper to leave money or jewels in such a place, unless they were secured in an iron safe.

In 1 Caines' Cases in Error (Furman v. Coe, page 96, decided in 1804), it was held, that the executor was not liable where a body of men broke into his house, and by force carried away funds of the estate. The fund was acquired during the Revolutionary War when the country was distracted and armed bodies of men were roaming about. It does not appear that there was any bank or safe place of deposit near. The money was kept in a strong chest in an upper chamber, and no question was raised that the executor was negligent. The court held that under the circumstances he was not liable.

The trustee at the present time, when banks and places of safe deposit so largely abound, would, probably, under the same circumstances, be held liable for negligence, because a man of common prudence and acting with common caution would not retain the custody of money and valuables liable to be stolen in such a place, when he could easily deposit them in a place of safety. It is repeatedly held that if a trustee, in the exercise of his best judgment, deposits money in a bank of good repute, that he is not liable in the event of the failure of the bank. In *Wharton on Negligence*, § 519, and cases there cited, it is held that a guardian having funds of his ward should not keep it in his house, but deposit it in bank. An executor or administrator is entitled to compensation for his services in taking care of the estate, and "held to a stricter accountability than a trustee without compensation."

In *Litchfield v. White*, 7 N. Y. 438, 57 Am. Dec. 534, it is held that an assignee, under a voluntary assignment for the benefit of creditors, being entitled to a compensation, is chargeable with the care of a provident owner and liable for a loss occasioned by ordinary negligence. See, also, 9 Alb. Law J. 423, and cases cited. The administratrix in this case is an old lady unaccustomed to business, which facts go to palliate what would in an ordinary business man be gross negligence, yet I cannot see why having assumed this trust for which she is compensated, and having gone on and sold the property and collected the debts due the estate, she should not be held to the exercise of at least common prudence. It appears that this money was kept in a place known to several persons. The place, to be sure, was a bed-room occupied by her sick son, but it was, nevertheless, a very insecure depository for such a sum of money, and presented a constant temptation to take it even to the members of her own family. Her husband had kept a bank account, of which she was aware. Although the bank was some twelve miles off, he had deemed it proper to deposit in it there, and she could and should have done the same. Had this money been only a portion of the estate lately collected, and had the rest been deposited in bank, she might be held authorized to keep the same where she did, until a proper opportunity to deposit in bank occurred, but the whole, or nearly all this fund had been allowed to remain in this insecure place for nearly a year, until it was finally stolen.

If executors and administrators are permitted to violate the most ordinary laws of prudence in such a manner, it will open the door for innumerable frauds, and place creditors and other persons interested in trust funds at the mercy of careless and reckless trustees.

I think the decree or order should be affirmed.

Present—MULLIN, P. J., and SMITH and TALCOTT, JJ.

Decree of Surrogate affirmed with costs.⁷¹

⁷¹ See *Lehman v. Robertson*, 84 Ala. 489, 492, 4 South. 728 (1887).
KEN. TR.—30

McKNIGHT v. McKNIGHT.

(Court of Appeals of South Carolina, 1858. 10 Rich. Eq. 157.)

On the 18th Dec., 1853, Isaac McKnight, being indebted to the value of his estate, entered into a postnuptial settlement. He executed a deed bearing that date, to his mother, Jane J. McKnight, and his brother, Joseph E. McKnight, by which he conveyed to them all his negroes for the sole and separate use of his wife, and for the support and maintenance of his children, with various conditions and limitations. The deed was not fraudulent and void, for it recognized the rights of creditors. It declared that after the payment of his debts, the property was to be held for the uses of the trust. During the interval, after the execution of the deed, and the time of his leaving the state, Isaac McKnight continued in the possession of the negroes. In Oct., 1855, he absconded, and left the state, taking with him all the negroes conveyed in the said deed of trust, except such of them as the Sheriff had previously sold.

This is a bill by the cestui que trusts, namely Mrs. Cecelia McKnight, the wife of Isaac McKnight and his three infant children, against Isaac McKnight, who has been made a party defendant by publication, and against Jane J. McKnight and Joseph E. McKnight, the trustees, for an account of the trust property, because of their alleged breach of trust and fraudulent complicity with Isaac McKnight, in the removal of the property beyond the limits of the state.

The bill was dismissed and complainants appealed.

The opinion of the court was delivered by

DARGAN, Ch. ⁷² The only breach of trust charged in the bill, is that the defendants accepted the trust, and took possession of the negroes and combining and confederating with A. Isaac McKnight, did aid, advise, assist and procure the removal of thirteen of the negroes, conveyed to them by the deed of trust. * * *

To these charges, the defendants answered, and the cause proceeded to trial on the issue thus made. No sufficient evidence was adduced to sustain the allegations of the bill. A decree was rendered in behalf of the defendants, dismissing the bill. An appeal is now brought before this court, and for the purpose of setting aside the decree, on an issue not presented in the pleadings, which the defendants were not called upon to answer, which the Circuit Court did not, and was not asked to consider, and about which, not one word was said on the Circuit trial. * * *

This suit was first conceived with a view of making the trustees liable for conniving at, aiding, abetting and procuring the fraudulent abduction of the trust negroes by McKnight. Failing to make out by the evidence a case, that can excite even a suspicion of the infidelity

⁷² Statement of facts abridged, and part of opinion omitted.

of the trustees in that regard, and changing their ground, they now contend, that without any connivance on their part in the escape of McKnight, and his abduction of the negroes the bare fact of their permitting the trust property to remain in the possession of McKnight, together with the loss of the negroes, is such a breach of the trust as to render them responsible to the plaintiffs for the value of the slaves. This Court is of opinion, that the simple fact relied on, is not sufficient to subject them to liability. The deed of trust did not inhibit such a course of management on the part of the trustees. Mrs. McKnight, the plaintiff, kept house. She had three little children. Surely the trustees could not have done better, than to allow her the use of her own domestic servants, instead of hiring them out to strangers, and with the proceeds of their hire, procuring other servants for Mrs. McKnight and her children. And if Mrs. McKnight, for her convenience and her comfort, could have, and was entitled to have the use of the domestic servants, so of the field hands, who were employed on a plantation whence the family's supplies were derived. What is the difference, so far as a faithful execution of the trust is concerned? Whether the trustees hired out these field negroes and from their wages procured Mrs. McKnight her necessary provisions, or suffered them to be employed directly in making these provisions, they (the trustees), having no complicity whatever with McKnight in carrying the negroes off. * * *

McKnight was living in harmonious domestic relations with his wife and family. There was no suspicion that he was about to abscond and carry off the trust negroes. * * *

To the court it does not appear that there was any devastavit or breach of trust on the part of the trustees.

It is ordered and decreed that the decree be affirmed and the appeal be dismissed.

DUNKIN and WARDLAW, CC., concurred.

Appeal dismissed.

CARPENTER v. CARPENTER.

(Supreme Court of Rhode Island, 1880. 12 R. I. 544, 34 Am. Rep. 716.)

Bill in equity for an account and to obtain payment of a trust fund. The facts involved are stated in the opinion of the court.

DURFEE, C. J. This is a suit in equity brought by Harris I. Carpenter, as legatee or cestui que trust under the will of his grandfather, the late Earl Carpenter, against Charles E. Carpenter, surviving executor of the will, for an account. The clause of the will under which the complainant makes his claim, directs the executors, within two years after the death of the testator, to invest the sum of

\$5,000 "in such stocks or other productive property as they may deem advisable, in their names as executors," and in the same manner to invest the income and profits, not required for the maintenance and education of the complainant, and the fund so created to pay over to the complainant on his attaining the age of twenty-five years. The will named the defendant and one David C. Anthony, executors. The testator died February 10, 1863. His will was admitted to probate, and the defendant and Anthony accepted the appointment as executors and qualified. The complainant attained the age of twenty-five years November 6, 1878. The bill alleges that the defendant refuses to account or to pay over the fund unless the complainant will accept in full satisfaction of his claim the sum of about \$3,000 deposited in a savings bank, which he declines to do. The bill also alleges that the defendant pretends that he invested \$5,000 as directed by the will in bonds which were stolen, and that he now has what he recovered, on deposit in said savings bank, and that he is only accountable for said deposit; whereas the bill alleges that the investment was not made in the names of the executors and did not constitute a trust fund under the will. The bill prays that the defendant may account for all moneys held in trust for the complainant, pursuant to the will, and for an account thereof, and that the defendant may be decreed to pay the complainant said sum of \$5,000 and such income as ought to have been received had the same been duly invested, and all sums which may be found to be justly due to him.

The facts in regard to said sum of \$5,000 are these. Within two years after the testator's death, to wit, January 23, 1865, the defendant and David C. Anthony opened an account on their book with the complainant, in which they charged themselves as trustees under the will, to his credit with \$5,000, which on the same day appears by the account to have been invested by them in three one thousand dollar United States coupon bonds, bearing interest at the rate of 7.3 per cent., being numbered 41,181, 41,587, 41,588 and two one thousand dollar coupon bonds of the State of Rhode Island, bearing six per cent. interest and being numbered 692 and 734. Having purchased these bonds for the trust, the executors sealed them up in an envelope superscribed: "Investment of five thousand dollars for Harris Irving Carpenter, January Twenty-third, 1865," and locked them, so sealed, in a tin box, which they deposited in the vault of the Traders' Bank in the City of Providence. Between Saturday, February 11, and Monday, February 13, 1865, the vault of this bank was entered by burglars and robbed of a large amount of property, among which were the bonds aforesaid. Efforts were made to recover the bonds, but without success. Eleven months after the robbery, no clue having been obtained, the executors closed the account on their book. Subsequently the executors, by giving heavy indemnity bonds, procured an issue of other United States bonds in place of the United States bonds which had

been stolen; but unfortunately the agent whom they employed in procuring them, and whom they believed to be trustworthy, he being an employee in the United States Treasury Department, was dishonest and converted them to his own use, and they were able to recover of him only a portion of the proceeds, being the moneys which, with the interest accruing, constitute the deposit in the savings bank.

The complainant contends that the trust was never duly constituted, and that he is therefore entitled to \$5,000, with interest, or such profit as it would have earned if duly invested. He contends that the trust was not constituted because the executors did not invest the moneys "in their names," as directed by the will.

[The Court decided that the executors had invested the \$5,000 "in their names" when they bought the bonds and designated them for the trust in an account which they opened in their names as trustees for the complainant and that, therefore, the trust had been duly constituted.]

The complainant contends that if the trust was constituted, the defendant is nevertheless liable for his subsequent mismanagement of it. He contends that the trustees did not use due care in making the deposit; that they ought to have adopted some means of identifying the bonds and rendering them useless to the thief, and that they were acting beyond the scope of their power when they authorized an agent to receive the new bonds in a form that permitted and invited a second theft. He contends that for these reasons the loss ought to be made good by the defendant. We think, however, that the trustees used as much care as prudent men ordinarily use in their own concerns, and that is all that was required of them. It is easy for the complainant to be wiser than the trustees after the event; but it is doubtful if, before it, he would have been either wiser or more careful. "In regard to the preservation and care of trust property," says Story in his Commentaries on Equity Jurisprudence, "it has been said, that a trustee is to keep it as he keeps his own. And therefore if he is robbed of money belonging to his cestui que trust, without his own default or negligence, he will not be chargeable. * * * The rule in all cases of this sort is, that when a trustee acts by other hands, either from necessity or conformably to the common usage of mankind, he is not to be made answerable for losses." 2 Story, Eq. Juris. § 1269; Perry on Trusts, §§ 404, 441; Lewin on Trusts, 224, 260 (6th Ed. London); Litchfield v. White, 7 N. Y. 438, 57 Am. Dec. 534.

The complainant also contends that investment in a savings bank was not authorized by the will. We are, however, of the opinion that a deposit in a dividend paying savings bank may be regarded as "productive property."

A decree may be entered referring the cause to a master to take the account, the trust to be treated as duly established. Other matters in

regard to the management of the trust which have been alluded to will come up more properly in taking the account or on the master's report.

Decree accordingly. ⁷³

FIELD v. FIELD.

(In Chancery before Kekewich, Justice, 1893. *Law Reports* [1894]
1 Chancery, 425.)

The plaintiff, Joshua Field, tenant for life under his mother's will, of a trust fund invested in the names of the defendants, the trustees, on a mortgage on a building estate moved for an injunction to restrain the defendants as trustees of the will, from permitting the deeds to remain in the hands or custody of their solicitors, or, unless the deeds were deposited by the defendants at a bank in their joint names, from permitting the same to remain in the possession or custody of any person or persons other than the defendants or one of them. ⁷⁴

KEKEWICH, J. This motion raises a question of practical importance, and one of extreme interest to solicitors, and still more to those numerous clients of theirs who are trustees. My first inclination was to say that a question of such a vast importance must be carefully considered, and that it would not be right to express an opinion upon it until after consideration, and in language carefully weighed; but further discussion has convinced me that I ought to dispose of this motion, not as dealing with an abstract question, but rather with reference to the circumstances of this particular case, instead of laying down any general rule. I have before me an affidavit of four gentlemen with regard to the convenience of the deposit of trust deeds with solicitors and the practice of the profession. These four gentlemen stand high in the profession, and it would be difficult to find four others better qualified to depose as to the practice and convenience of business; but they and the notice of motion alike seem to me to evade what, to my mind, is the real point. A comparison has been made between the deposit of deeds in a solicitor's office and the deposit of them in a bank. The question is not whether the trust deeds may be conveniently deposited in a solicitor's office, or in a bank, or anywhere else, but whether the deeds ought to be under the personal control of the trustees. If solicitors are prepared to make in their own office, or elsewhere, arrangements for depositing trust deeds, so that they may be under the control of trustees, I cannot myself see that this is open to any objection, and the suggestion as to keeping the deeds at a bank has not much to do with the case, and only introduces confusion.

⁷³ *Jones v. Lewis*, 2 Ves. Sr. 240 (1750); *Raw v. Cutten*, 9 Bing. 96 (1832); *Job v. Job*, L. R. 6 Ch. Div. 562 (1877); *McCabe v. Fowler*, 84 N. Y. 314 (1881).

⁷⁴ The statement of facts is abridged.

The general principle, in my opinion, is that trustees must have their muniments of title, as well as their securities, under their own control. I have held in one case some time ago, *Webb v. Jonas* [39 Ch. D. 660], that this was enough to prevent trustees investing on a contributory first mortgage, because trustees investing on any particular mortgage security are bound to have the trust money and the security in their own names, and if the money and the security are in the names of others they are not fulfilling that obligation. The same thing applies to documents and deeds in their possession. They are intrusted with the custody of them, and they are bound within reasonable limits to see that the deeds are kept in a safe place, and that no one else can take them away. But to that obligation there must be reasonable limits. In order to realize the trust estate, the deeds must be in the custody of the solicitor to the trustees. He has to make abstracts of them, to make an examination of the deeds abstracted, and, if the property is sold in lots, the purchasers must have the opportunity of examining the deeds with the abstracts, if they wish, and even a second and a third examination may be necessary before completion. It would be a monstrous thing to say that the trustees have to keep the deeds all that time in a box with perhaps three or four keys, so that if any purchaser wishes to consult the deeds all the trustees would have to attend in person. That strikes one immediately as showing that reasonable limits to the trustees' obligation should be applied.

In the present case I have the trustees of a will, having their trust fund invested on mortgage. It happens that the tenant for life under the settlement is the mortgagor, but that is immaterial for the present purpose. The mortgaged property is a building estate in course of development; we all know what that is. From time to time building agreements have to be prepared and leases granted, and the deeds have to be consulted in order to see, for instance, that the parcels are all right, or that the powers have been properly observed, or that the boundaries of a plot in a second intended lease do not overlap the boundaries in the first, and so forth. It is practically impossible to deal with such questions unless the solicitor to the trustees has the deeds. On the other hand, there is possible danger in that course. Rules are made not only for the guidance of solicitors who are honest, as in the overwhelming majority of instances they are, but also with reference to dishonest solicitors, of whom, unfortunately, there are some. It is extremely difficult to lay down any general rule, and to say where any general rule may be departed from. In my opinion it comes to this—that the solicitor may do what is reasonable and may advise the trustees as to what is reasonable. If there is a trust shut up for years, as often happens, and there is nothing in it to be done, I do not see why the deeds should not be locked up in a box in a bank or a safe deposit, and the trustees keep the keys, and that is the proper course to pursue. If, on the other hand, they are wanted from time to time, I do not think the trustees are acting unreasonably in giving

their solicitor the power to do what it right and necessary for the despatch of business. If the particular business comes to an end and there is no further occasion to refer to the deeds, then they can be put into a safe place. I am now referring to title-deeds only. With regard to bonds and certificates payable to bearer, I have not the slightest doubt that they ought not be under the control of a solicitor, or any other agent.⁷⁵ The trustees are responsible for them, and they must keep them, not necessarily in their own custody, but in some place where they cannot be got at without the consent of the whole body.

I am not prepared to make any order on the motion; but the matter has been fairly argued, and therefore I make no order, except that the costs of the motion are to be costs in the action.

SECTION 6.—WHO MAY EXECUTE A TRUST.

ADAMS v. TAUNTON.

(In Chancery, before Sir John Leach, Vice Chancellor, 1820. 5 Maddock, 435.)

Henry Byne by his will, 1st September, 1815, devised all his estates to the plaintiff, George Adams, and to Ralph Carr, their heirs, executors, administrators and assigns, in trust to sell the same by public auction or private contract, either together or in parcels, and to apply the produce amongst his children, equally, and appointed the said George Adams and Ralph Carr executors of his will, and declared that the receipts of Adams and Carr should be a sufficient discharge to the purchasers. The testator died on the 20th June, 1816. Carr by deed-poll renounced.

The plaintiff Adams alone proved the will, and on the 21st October, 1819, he put up parts of the testator's real estates to sale by public auction, and the defendant became the purchaser of four lots for the sum of £2,670.

The defendant refused to complete his purchase, because Ralph Carr refused to join with the plaintiff in the conveyance to the defendant, and to join in the receipt for the purchase money, and in consequence the present suit was instituted for a specific performance of the purchase agreement.⁷⁶

Mr. Bell and Mr. Girdleston, for the plaintiff, insisted, that in consequence of the deed-poll of the 1st July, 1816, the plaintiff alone was enabled to convey and give a sufficient receipt for the purchase money, and they cited *Bonifant v. Greenfield*, Cro. Eliz. 80, *Leon*, 60, and *Hawkins v. Kemp*, 3 East, 410.

⁷⁵ See *Matthews v. Brise*, 6 Beav. 239 (1843).

⁷⁶ The statement is abridged.

Mr. Wyatt, for the defendant:

The defendant is desirous of completing his contract, but as it has been a doubt in the profession, whether the co-trustee ought not to join in the conveyance and receipt, the defendant is justifiable in his objection, and is not compellable to take a title subject to doubt.

The Vice Chancellor expressed himself in favor of the plaintiff, but said he would look into the authorities.

On this day [6th Dec. 1820] the Vice Chancellor said, it being now settled that a devise to A, B and C upon trust, is a good devise to such of the three as accept the trust, it follows by necessary construction, that by the receipt of the trustees is to be intended the receipt of those who accept the trust.

A specific performance was decreed, but without costs. ⁷⁷

DOILY v. SHERRATT.

(In Chancery, before Hon. John Verney, Master of the Rolls, 1735. 2 Equity Cases Abridged, 742.)

A by will appoints two trustees, to whom and their heirs, executors and assigns, he devises his real and personal estate on several trusts; and in case one die, then the other to execute the same. During their joint lives if one refuse to act, the other cannot act without him; but the trust devolves upon the Court.

In re WADSWORTH.

(Court of Chancery of New York, 1847. 2 Barb. Ch., 381.)

This case came before the Chancellor upon the petition of James S. Wadsworth and Elizabeth Wadsworth to remove W. W. Wadsworth as one of the executors and trustees under the will of his father, and to appoint another trustee in his place, so far as related to the

⁷⁷ *Bonifant v. Greenfield*, Cro. Eliz. 80 (1587); *Smith v. Wheeler*, 1 Ventris, 128 (1672); s. c. 2 Keble, 772; *Hawkins v. Kemp*, 3 East, 410 (1803); *Small v. Marwood*, 9 B. & C. 300 (1829); *Eaton v. Smith*, 2 Beav. 236 (1839); *Cooke v. Crawford*, 13 Sim. 91 (1842); *Browell v. Reed*, 1 Hare, 434 (1842); *Cape v. Bent*, 9 Jur. 653 (1845); *Watson v. Pearson*, 2 Ex. 581 (1848); *Peppercorn v. Wayman*, 5 De G. & Sm. 230 (1852); *White v. McDermott*, 7 Ir. R. C. L. 1 (1872); *Nicoll v. Miller*, 37 Ill. 387, 411 (1865); *Putnam Free School v. Fisher*, 30 Me. 523 (1849); *Ratcliffe v. Sangston*, 18 Md. 383 (1862); *Long v. Long*, 62 Md. 33, 57 (1884); *Ellis v. Boston, etc. Co.*, 107 Mass. 1, 13 (1871); *Scully v. Reeves*, 3 N. J. Eq. 84, 29 Am. Dec. 694 (1834); *Jackson v. Ferris*, 15 Johns (N. Y.) 346 (1818); *Matter of Stevenson*, 3 Paige (N. Y.) 420 (1832); *King v. Donnelly*, 5 Paige (N. Y.) 46 (1835); *Matter of Van Schoonhoven*, 5 Paige (N. Y.) 559 (1836); *Niles v. Stevens*, 4 Denio (N. Y.) 399 (1847); *Leggett v. Hunter*, 19 N. Y. 445 (1859); *Clemens v. Clemens*, 60 Barb. (N. Y.) 366 (1867); *Lessee of Zebach v. Smith*, 3 Bin. (Pa.) 69, 5 Am. Dec. 352 (1810); *Bailey, Jr., Petitioner*, 15 R. I. 60, 1 Atl. 131 (1885); *De Saussure v. Lyons*, 9 S. C. 492 (1878).

trust created for the benefit of the petitioner, E. Wadsworth. The testator devised one-fourth of his residuary real estate to his two sons, J. S. Wadsworth and W. W. Wadsworth and to his son-in-law M. Brimmer, and to their successors, as trustees of his daughter Elizabeth; in trust to receive the rents, profits and income thereof for her separate use, with remainder to her issue, if she should have any at death; and if she should die without issue, then to the other heirs at law of the testator in fee. And the trustees were authorized to lease the real estate embraced in the trust, for terms not exceeding twenty-one years, or to sell the lands and re-invest the proceeds in other lands, or in public stocks, or bonds and mortgages upon the same trusts; the cestui que trust assenting to such sales by joining in the conveyances of the lands. He also bequeathed one fourth of his residuary personal estate to the same trustees; in trust to receive and pay over the income thereof to his daughter Elizabeth for life, with power to her to dispose of the principal thereof by will at her death, and with power to the trustees to convert it into real estate, during her lifetime; to be held by them upon the same trusts.

He also appointed his two sons and his son-in-law the executors of his will.

The testator died in 1844, and all the executors proved the will.

M. Brimmer refused to accept said trust, and it therefore devolved upon the two sons. In 1846, W. W. Wadsworth became of unsound mind, and was found to be a lunatic upon a commission issued to inquire into the fact.

THE CHANCELLOR [REUBEN H. WALWORTH].⁷⁸ The common law has made no provision for the execution of a joint trust by one of the trustees, where the co-trustee, by reason of lunacy or other inability, becomes incompetent to execute the trust. This, therefore, appears to be a proper case for the interposition of the Court to remove the lunatic trustee, under the provisions of the revised statutes; so that the trusts both as to the residuary estate given to the daughter, and as to that given to the grandson of the testator, may be executed, either by the remaining trustee, or by him and such other person as may be substituted in place of the lunatic.

SWALE v. SWALE.

(In Chancery before Sir John Romilly, Master of the Rolls, 1856. 22 Beavan, 584.)

THE MASTER OF THE ROLLS.⁷⁹ I think the plaintiff is entitled to a receiver. What has taken place is thus described in the answer: Joseph Swale and Henry Anderson ask Mr. Holden to concur with

⁷⁸ The statement is abridged and only a part of the opinion is given.

⁷⁹ The statement of facts is omitted.

them in making certain investments of the trust property. Mr. Holden, disagreeing with them, refused to concur. Thereupon, they continued to act in the trusts, without conferring with or consulting him. It appears also, that they have actually advanced money on certain securities, omitting the name of Mr. Holden, and that in one case, they have taken a security in the name of one only. This Court cannot approve of one trustee investing trust money in his own name exclusively of the others.

It is suggested, that one executor may act without the concurrence of the others; but it is impossible that this can be treated as an executorship account. The testator died four years and a half ago, and this transaction seems to have taken place, not in their character of executors, but in their character of trustees. I think that the plaintiff, who is interested in the property, is not to be excluded in this manner.

The answer of the two trustees is this: they say, that if Mr. Holden will concur with them they will be exceedingly happy to go on and act together, but that if he differ from them, then that they must act for themselves. Considering the manner in which this Court deals with trustees, whenever a breach of trust is committed, and the way in which Holden might be involved in one, it seems not unreasonable that he should insist on his view of the case being adopted, or, at least, that the view of the other two trustees should not control his. The testator intended to have the assistance and discretion of three trustees, but here, as it sometimes happens, they do not act amicably together, their united assistance and discretion cannot be obtained, and the majority act alone in the administration of the trust. In that state of things, the plaintiff is entitled to have the receiver appointed.

A necessity is shown for some interposition to protect this property, not merely for the sake of the two tenants for life, but for the interest of the persons who may hereafter become entitled, who are not *sui juris*, and are a class at present unascertained.⁸⁰

⁸⁰ In the execution of a private trust all the trustees must join. *Sloo v. Law*, 3 Blatchf. 459, 471, 472, Fed. Cas. No. 12,957 (1856); *Loud v. Winchester*, 52 Mich. 174, 185, 17 N. W. 784 (1883); *Green v. Miller*, 6 John. (N. Y.) 39, 5 Am. Dec. 184 (1810); *Sinclair v. Jackson*, 8 Cow. (N. Y.) 543, 584 (1826). Unless authority to act is given to less than all by the creator of the trust, as in *Attorney General v. Cuming*, 2 Y. & C. Ch. R. 139 (1843), or is to be inferred from the nature of the trust as in *Sloo v. Law*, 3 Blatchf. 459, Fed. Cas. No. 12,957 (1856).

Public trusts may be executed by a majority of the trustees. *Wilkinson v. Malin*, 2 Tyrwhitt, 545 (1832); *Perry v. Shipway*, 1 Giff. 1 (1859), affirmed 4 De G. & J. 353 (1859); *Cooper v. Gordon*, L. R. 8 Eq. 249 (1869); *Scott v. Detroit Young Men's Society's Lessee*, 1 Doug. (Mich.) 119 (1843); *Hill v. Josselyn*, 21 Miss. 597 (1850).

GUTMAN v. BUCKLER.

(Court of Appeals of Maryland, 1888. 69 Md. 7, 13 Atl. 635.)

Appeal from the Circuit Court of Baltimore City.

This appeal was taken from a decree of the Court below requiring of the defendant a specific performance of his contract to purchase of the plaintiff a certain piece of property in Baltimore City.

ROBINSON, J., delivered the opinion of the Court.

The only point in this case, is whether the power to sell and invest the proceeds of sale given to two trustees, can upon the death of one of them, be exercised by the survivor? And this question depends upon the construction of the deed made by Mrs. White in contemplation of her marriage, and in the execution of which, Doctor Buckler her intended husband united. By this deed, she conveyed to Henry White and Doctor Buckler, their heirs, executors, administrators and assigns, as joint tenants, all her property real and personal, to have and to hold the same to the use of the said Henry White and Doctor Buckler as joint tenants, their heirs, executors, administrators and assigns in trust.

1st. To permit the grantor to possess, enjoy and dispose of the same as she shall see fit and proper up to the time of her marriage.

2nd. After her marriage to receive and collect the rents, profits and income of said property, and pay the same to the grantor for her sole and separate use.

3rd. In trust for such persons as the grantor may appoint by last will and testament, and in default of such appointment, in trust to pay to Doctor Buckler the sum of five thousand dollars per annum during his life, and then in trust, etc.

The deed further provides "that whenever it may become necessary to invest any part of the principal of the trust estate, the same may be invested at the discretion of the trustees, who are further authorized, as they shall see fit, to change any existing investment, and for that purpose may sell and convey any part of the trust estate, without any obligation on the part of the purchaser to see to the application of the purchase money."

Since the marriage of the parties, Henry White, one of the trustees has died, and Doctor Buckler, surviving trustee, has agreed to sell to the appellant a leasehold interest belonging to the trust estate, and the question is whether he can convey a valid title to the purchaser? Now a bare power or authority given to two persons cannot, in the absence of "words of survivorship," or language of like import, be exercised by the survivor. Having thus named the persons by whom the power is to be exercised, the law presumes, in the absence of language showing a contrary intention, that the donor meant a joint execution of the power, and if one of them dies it cannot be exercised by the survivor. The power in such case does not survive. Coke, Littleton, 113a; Pey-

ton v. Bury, 2 P. Wms. 626; Attorney General v. Gleg, 1 Atk. 356; Dyer 177a; Sugd. on Powers, 143.

But the power given to the trustees in the deed before us, is not a bare power. On the contrary, the entire legal estate is vested in them, and to be held by them as joint tenants upon certain trusts declared in the deed. And to this estate is annexed a power to be exercised by them as trustees over and in regard to the property. Such a power, according to all the authorities, is a power coupled with an interest and as such may be exercised by the surviving trustee. Co. Lit. 113a, 181b; Hawkins v. Kemp, 3 East, 410; Eaton v. Smith, 2 Beavan, 23; Flanders v. Clark, 1 Ves. Sr. 9; Clarke v. Parker, 19 Ves. 19.

In *Watson v. Pearson*, 2 Exch., 594, the testator devised all his property to his wife and two other persons, in trust to collect and receive the rents and income and to pay the same to his wife during her life, with power to sell and mortgage or otherwise manage his estate. One of the trustees died and another disclaimed the trust, and the power, the Court said, survived to the wife as sole trustee; and one of the powers it will be observed was to sell the estate if the trustees should deem it expedient.

And again in *Lane v. Debenham*, 11 Hare, 188, where the testator devised his estate to two trustees in fee, upon trust, as soon as convenient, to raise the sum of £2,000., for the benefit of the testator's daughter, by sale or otherwise, at the discretion of the trustees, and one of the trustees died, the Vice Chancellor held, the power survived, and that the surviving trustee could sell and convey a good title.

So in *Gray et al. v. Lynch and McDonald*, 8 Gill, 403, where the testator devised all his property to three persons in trust to sell the same and to invest the proceeds in some profitable stock, to be held by them in trust for the sole and separate use of the testator's two daughters, the Court, after a full review of all the authorities, decided that the power thus given to the trustees to sell was a power coupled with an interest, and as such could be exercised by the surviving trustees. And although the property was not in terms devised to the trustees as joint tenants, yet the Court said, looking to the nature, objects and provisions of the will, it was clearly the intention of the testator that the power given to the trustees should, upon the death of one of them, be exercised by the survivor.

In this case the estate is conveyed to the trustees as joint tenants, and the power is given to them as trustees to be exercised by them in regard to the trust estate, and such a power is according to all the cases a power coupled with an interest, and survives to the surviving trustees.⁸¹

Decree affirmed.

⁸¹ *Attorney General v. Glegg*, Ambler, 584 (1738); *Watson v. Pearson*, 2 Ex. 581 (1848); *Lane v. Debenham*, 11 Hare, 188 (1853); *Peter v. Beverly*, 10 Pet. 532, 9 L. Ed. 522 (1836); *Loring v. Marsh*, 6 Wall. 337, 18 L. Ed. 802 (1867); *Parsons v. Boyd*, 20 Ala. 112 (1852); *Saunders v. Schmaelzle*, 49

MORTIMER v. IRELAND.

(In Chancery, before Lord Cottenham, Chancellor, 1847. 11 Jurist, 721.)

This was an appeal from the decision of Wigram V. C., and the point in question was, whether under the following circumstances, the defendant R. Ireland was, or was not, a trustee of the will of Thomas Bythessea Mortimer. The testator by his will, dated the 16th July, 1835, after giving certain pecuniary legacies, added: "I give to Mr. Thomas Griffiths, solicitor, of Cheltenham, the sum of £300., and to Mr. Pruen, jun., his partner, £100., and I constitute and appoint these two gentlemen my executors and trustees." T. Griffiths and E. Pruen, the executors thus named, both survived the testator. The former died on 17th July, 1836, without having proved the will, or in any way acted in the trusts; E. Pruen alone proved the will, and acted. On the 31st March, 1846, E. Pruen died, having by his will, dated the 11th December, 1841, appointed H. Pruen and R. Ireland his executors, and having by a codicil, dated the 13th December, 1841, given and bequeathed to R. Ireland all messuages, lands, tenements and hereditaments, and all moneys and securities for money vested in him as trustee or surviving trustee for any person or persons whomsoever, to hold to him, his heirs, executors, administrators, and assigns, upon and subject to the several trusts and equities affecting the same hereditaments respectively, on which the same were vested in him. Both executors proved the will. On the 1st September, 1846, a bill was filed by the parties interested under the will of T. B. Mortimer, praying that it might be declared by the Court, whether R. Ireland, under and by virtue of the codicil of E. Pruen, had or had not been duly appointed a trustee of the trust moneys and premises of T. B. Mortimer; and that it might be referred to the Master to appoint a new trustee or trustees of the said trust moneys and premises, to act with or in the place or stead of R. Ireland; and that R. Ireland and H. Pruen might be ordered to pay, transfer, and deliver the trust moneys and premises, and the interest received thereon and the securities for the same, to such new trustee or new trustees; and that, if necessary, R. Ireland and H. Pruen, and all other necessary parties, might be directed to join in such instrument or instruments as might be necessary for assigning and releasing the trust moneys and premises, and the securities for the same, to such new trustee or trustees; upon the trusts of the will of the testator, Thomas Bythessea Mortimer. On the 27th May, 1847, the cause came on before the Vice Chancellor, when His Honor, without prejudice to any questions in the cause, referred it to the Master to approve of two new trustees, with liberty to R. Ireland to propose himself, reserving further directions and costs, and giving

Cal. 59 (1874); *Gray v. Lynch*, 8 Gill (Md.) 403 (1849); *Franklin v. Osgood*, 2 Johns. Ch. (N. Y.) 1, 7 Am. Dec. 513 (1816), affirmed 14 John. (N. Y.) 527 (1817); *Belmont v. O'Brien*, 12 N. Y. 394 (1855).

liberty to the parties to apply. 6 Hare, 196. From this decision the defendant R. Ireland now appealed to the Lord Chancellor.

LORD CHANCELLOR. The argument amounts to this, that the executor of a trustee is of right a trustee. Whether the property is real or personal estate is no matter, for suppose a man appoints a trustee of real and personal estate simpliciter, adding nothing more, this cannot make his representative a trustee. The case before the Master of the Rolls (*Titley v. Wolstenholme*, 7 Beav. 425) was quite different, for there the Court proceeded on the intention manifested, that the trust should be performed by the assigns of the survivor. The property may vest in the representative, but that is quite another question from his being trustee. The testator may select the heir to succeed to the trust, but he only can do so. Here there are two persons appointed trustees; both die; thus there is no trustee, and it is for the Court to appoint new ones. The testator having given no indication of intention, the Court must refer it to the Master. The decree of the Vice Chancellor is right in its form. The appeal must be dismissed with costs.⁸²

COOKE v. CRAWFORD.

(In Chancery, before Sir Lancelot Shadwell, Vice Chancellor, 1842. 13 Simons, 91.)

Bill by the devisee of William Hall, the younger, for specific performance of a contract for purchase.⁸³

THE VICE CHANCELLOR. I am of opinion that the demurrer in this case, must be allowed; for it is plain that the persons whom the surviving trustee has thought proper to appoint to execute the trusts of the testator's will, are persons to whom no authority was given, for that purpose, by the testator, and there is no case in which a person not mentioned by the party creating the trust, has been held entitled to execute it.

I have always understood, ever since the point was decided in *Hawkins v. Kemp*, 3 East, 410 (or rather was, as the judges said in that case, properly abandoned by the defendant's counsel, as not capable of being contended for), that, where two or more persons are appointed trustees, and all of them, except one, renounce, the trust may be executed by that one. That decision, if it may be so called, has been approved of by Lord Eldon and other judges.

Now, in the present case, the testator devised his estate in the County of Lincoln, to his son, William Hall, and his friends, James Burkitt and William Woolley, upon trust that they and the survivors

⁸² See *In re Ingleby*, L. R. 13 Ir. 326 (1883); *In re Crunden and Meux's Contract*, L. R. 1 Ch. 670 (1909).

⁸³ The statement of facts is omitted.

or survivor of them or the heirs of said survivor, should, as soon as conveniently might be after his decease, but at their discretion, sell his estates either by public auction or by private contract, and either altogether or in parcels, for such price or prices as they should consider the value thereof; and, for the purpose of effecting any and every such sale, he has empowered his trustees and their heirs to enter into and execute all necessary contracts, conveyances and other assurances to or in favor of the purchaser or purchasers of his estates. Then he proceeds to declare that the written receipt or receipts of the trustees, or of the survivors or survivor of them, or the heirs, executors, or administrators of such survivor, shall be good discharges to the purchasers.

It is observable that the testator has not used the word "assigns" either in the clause in which he has created the trust for sale, or in either of the two clauses that follow it, in which he points out the machinery by which the sale is to be effected. He does not introduce that word until he begins to speak of something that is to be done after the sale has taken place, that is, until he declares the trusts upon which the proceeds of the sale are to be held. Therefore, it is plain that, when William Hall, who, by the disclaimer of Burkitt and Woolley, became the sole trustee, thought fit to devise the legal estate that was vested in him, he did an act which he was not authorized to do.

And here I must enter my protest against the proposition which was stated in the course of the argument, that it is a beneficial thing for a trustee to devise an estate which is vested in him in that character. My opinion is that it is not beneficial to the testator's estate that he should be allowed to dispose of it to whomsoever he may think proper; nor is it lawful for him to make any disposition of it. He ought to permit it to descend; for, in so doing, he acts in accordance with the devise made to him. If he devises the estate, I am inclined to think that the court, if it were urged so to do, would order the costs of getting the legal title out of the devisee, to be borne by the assets of the trustee. I see no substantial distinction between a conveyance by act inter vivos, and a devise; for the latter is nothing but a post mortem conveyance; and, if the one is unlawful, the other must be unlawful.

It appears to me that, as my decision in *Bradford v. Belfield*, 2 Sim. 264, has been acquiesced in, the question raised by the demurrer in this case, is concluded by that decision: but, if it is not, then the authority of *Townsend v. Wilson*, 1 B. & Ad. 608, and 3 Madd. 261, is binding on the point. And my opinion is that the plaintiffs, who may be properly called the assigns of William Hall, the sole acting trustee of the testator's will, are not the persons to execute the trusts of that will; consequently I shall allow the demurrer.⁸⁴

⁸⁴ Contra: *Osborne to Rowlett*, L. R. 13 Ch. Div. 774 (1880).

TITLEY v. WOLSTENHOLME.

(In Chancery before Lord Langdale, Master of the Rolls, 1844. 7 Beavan, 425.)

THE MASTER OF THE ROLLS.⁸⁵ Robert Tebbutt was surviving trustee and executor under the will of Richard Titley. By his will dated the 30th of July, 1838, Robert Tebbutt gave, devised, and bequeathed unto the use of Edward Titley, David Waddington, and Charles Wolstenholme, their heirs, executors, administrators and assigns, all the trust estates, moneys, and premises vested in him as surviving devisee in trust and executor, named and appointed in and by the last will of Richard Titley, to hold the same, to the use of the said Edward Titley, David Waddington, and Charles Wolstenholme, their heirs, executors, administrators, and assigns, according to the nature and quality of the same premises respectively, upon the same trusts, and to and for the same ends, intents, and purposes, and under and subject to the same powers, provisos, and declarations as are limited, expressed, declared, and contained of and concerning the said estates, moneys, and premises, in and by the said will of the said Richard Titley, or as near thereto as circumstances would admit.

The question in this cause is, whether the devisees in trust, under the will of Robert Tebbutt have, by virtue of the devise, lawfully become trustees of the estates devised by the will of Richard Titley. It is admitted that the legal estates and interests which were vested in Robert Tebbutt, as surviving trustee and executor, have, by virtue of his will, become vested in his devisees and legatees; that they, as such devisees and legatees, are under an obligation so to dispose of such legal estates and interests, that the cestuis que trust under the will of Richard Titley may have the benefit of them; but it is alleged, that they have not, themselves, any legal authority to execute the trusts, and consequently, that new trustees ought to be appointed for the purpose by this court.

Richard Titley, the testator, by his will, dated the 16th of January, 1828, gave, devised, and bequeathed to his wife, his son Richard, and Robert Tebbutt, their heirs, executors, administrators, and assigns, all his real estate and all his personal estate; to hold the same real and personal estate, to the use of his wife, his son Richard, and Robert Tebbutt, their heirs, executors, administrators, and assigns, according to the nature thereof, to, for, and upon the several uses, trusts, ends, intents, and purposes in his will after mentioned and declared. * * *

The testator has not, by his will, given any power to appoint new trustees, and it is thereupon argued, justly, that the trustees, or the survivors or survivor of them, could not, by any assignment or act

⁸⁵ The statement of facts is abridged and part of the opinion is omitted.

inter vivos, relieve themselves from the responsibilities and duties of the trust; but it is further contended, that the same disability attends any assignment by way of devise or bequest, and that although the estate and property may be vested in the devisees or legatees of the surviving trustee, the duties and the responsibilities attending the execution of the trusts remain in the legal representatives, real and personal, of the surviving trustee. * * *

When a trust estate is limited to several trustees, and the survivors and survivor of them, and the heirs of the survivor of them, and no power of appointing new trustees is given, we observe a personal confidence given, or at least probably given, to every one of the several trustees. As any one may be the survivor, the whole power will eventually come to that one, and he is entrusted with it, and being so, he is not, without a special power, to assign it to any other; he cannot, of his own authority, during his own life, relieve himself from the duties and responsibilities which he has undertaken. * * *

We have, in this will, expressions which clearly show that the testator intended the trust to be performed by the "assigns" of the surviving trustee; and in construing the will, we must, if practicable, ascribe a rational and legal effect to every word which it contains. We cannot, consistently with the rules of this court, consider the word "assigns" as meaning the person who may be made such by the spontaneous act of the surviving trustee to take effect during his life; but there seems nothing to prevent our considering it as meaning the persons who may be made such by devise and bequest; and if we do not consider the word "assigns" as meaning such persons, it would, in this will, have no meaning or effect whatever.

For these reasons, and under the circumstances of this case, I am of opinion, that the devise and bequest made by Robert Tebbutt of the trust estates held by him under the will of Richard Titley, was a good and valid devise and bequest; and that the estates thereby given to Edward Titley, David Waddington, and Charles Wolstenholme are vested in them, on such of the trusts thereof declared by the will of Richard Titley, as now remain to be performed.⁸⁶

In re MORTON and HALLETT.

(In the Court of Appeal, 1880, Law Reports, 15 Chancery Division, 143.)

John Cole, by will, dated the 28th of May, 1852, devised to H. N. Wixley and George Morton, and their heirs all his freehold and copyhold estates upon trust for Margaret May during her life, and then to sell the same and stand possessed of the proceeds upon trust to pay and divide the same, among the children of certain persons named.

⁸⁶ See *Hall v. May*, 3 K. & J. 585 (1857).

The testator died in September, 1852, and his will was proved by the two executors. The surviving trustee died intestate in 1859. The tenant for life having died, the customary heir of the surviving trustee was admitted to the copyholds, and entered into a contract for the sale of a part of them. The question whether he could make a good title came before the Master of the Rolls (Sir George Jessel) on an adjourned summons, under the Vendor and Purchaser Act, 1874, on the 10th of February, 1880. He decided that the customary heir could make good title, and dismissed the summons without costs. The purchaser appealed.

JAMES L. J.⁸⁷ I am of opinion that the appeal must be dismissed. I agree with the Master of the Rolls that if an estate is given to A and B and their heirs on trust to sell, the heir of the survivor of A and B is a trustee under the will, takes the estate on trust for sale, and can sell it. * * *

BAGGALLAY, L. J. I am of the same opinion, and have only to add that if it had been necessary to give any opinion on the point arising in *Osborne to Rowlett*, 13 Ch. D. 774, I should have taken time to consider whether that decision ought to be followed. As at present advised, I am not prepared to dissent from *Cooke v. Crawford* [13 Sim. 91].

BRAMWELL, L. J., concurred.

JAMES, L. J. I also wish to add that I am not prepared to say that *Cooke v. Crawford* is to be considered as overruled.⁸⁸

BAYLEY v. MANSELL.

(In Chancery, before Sir John Leach, Vice Chancellor, 1819. 4 Maddock, 226.)

On a bill filed for the substitution of new trustees, a decree was made accordingly, and for a conveyance to them. Mr. Shadwell suggested, that it would be convenient, by a clause in the conveyance, to enable the new trustees to appoint others in their stead, if it should become necessary; but the Vice Chancellor refused to direct the insertion of such a clause, there being no provision to that effect in the trust deed.

⁸⁷ A part of the opinion of James, L. J., is omitted.

⁸⁸ See, also, *In re Cunningham*, L. R. (1891) 2 Ch. 567.

The trust in such a case cannot be executed by an assignee of the trustee by a conveyance *inter vivos*. *Y. B. 15 H. vii*; *Bradford v. Belfield*, 2 Sim. 264 (1828); *Titley v. Wolstenholme*, 7 Beav. 425, 434, 435, 436 (1844); *Hall v. May*, 3 K. & J. 585 (1857); *Whittelsey v. Hughes*, 39 Mo. 13 (1866); *Suarez v. Pumpelly*, 2 Sandf. Ch. (N. Y.) 336 (1845); *Seely v. Hills*, 49 Wis. 473, 5 N. W. 940 (1880). Nor by a testamentary assignee of the surviving trustee. *Cooke v. Crawford*, 13 Sim. 91 (1842); *Wilson v. Bennett*, 5 De G. & Sm. 475 (1852); *Hall v. May*, 3 K. & J. 585, 587 (1857); *Stevens v. Austen*, 3 E. & E. 685 (1861); *Druid Park Heights Co. v. Oettinger*, 53 Md. 46, 59 (1880).

WHITE v. WHITE.

(In Chancery, before Lord Langdale, Master of the Rolls, 1842. 5 Beavan, 221.)

This was a bill for the appointment of two new trustees, in the place of trustees appointed by the testator's will, but who had died in his lifetime. The will contained a power for the surviving or continuing trustees or trustee, or the executors or administrators of the last surviving or continuing trustee, to appoint new trustees in the place of trustees dying, desiring to be discharged, etc.

Mr. R. W. E. Forster asked that the Master might insert a power authorizing the trustees now to be appointed, to appoint future new trustees; he referred to *Joyce v. Joyce*, 2 Moll. 276, as an authority.

THE MASTER OF THE ROLLS said, he would look at the case cited, but he saw no objection to what was proposed to be done.

His Lordship ordered that the Master, in settling the conveyance, should be at liberty, if he should think fit, to insert the power to appoint new trustees.

ANONYMOUS.

(Cited from *Bradwell v. Catchpole*, 3 Swanston, 78, note [a], page 79.)

Sir J. Jekyll cited a late case at the Rolls, where one who was a trustee for a woman and her children did with the woman's consent, assign his trust to another who was guilty of a breach of trust, and the first trustee decreed to make satisfaction, because trustees cannot divest themselves of their trust at their pleasure.⁸⁹

HULME v. HULME.

(In Chancery, before Sir John Leach, Master of the Rolls, 1833. 2 Mylne & Keen, 682.)

On the 26th of July, 1810, articles of settlement, in contemplation of an intended marriage between James Hulme and Ellen Docksey, were executed for conveying and assigning in trust to Thomas Stafford and John Braithwaite certain real estates, as soon as Ellen Docksey should attain the age of twenty-one, together with a sum of £500. in money, to the use of the intended wife for life, remainder to the intended husband for life, remainder to the children of the marriage, with an ultimate limitation to the intended wife in fee. The marriage was shortly after solemnized. The wife attained her age of twenty-one in November, 1813, when the articles were carried into execution by indentures of settlement, dated the 2nd and 3rd of

⁸⁹ See *Hardwick v. Mynd*, 1 Anstruther, 109 (1793).

November in that year. On the same 3rd day of November an appointment, which was prepared by the same solicitor who prepared the settlement, was executed by the husband and wife, by which Powell, one of the defendants, who was a private sailor, was named as a single trustee in the place of Stafford and Braithwaite, who were alleged to be desirous of being discharged from the trust; and the £500. having been invested in the purchase of three per cent. consolidated annuities, the stock was transferred by Stafford and Braithwaite to the new appointed single trustee, and by him immediately sold out and handed over to the husband, who shortly afterwards became bankrupt.

The bill was filed by the children of the marriage against the new trustee, and against Stafford, praying a retransfer of the stock which had been so transferred to the husband. Braithwaite, the other trustee, died insolvent, and his representatives were not made parties to the suit. It appeared, upon reference to the terms of the settlement, that it was the clear intention of the parties that there should in all times be two trustees of the property comprised in the settlement; and it was admitted by the counsel for the defendant Stafford that this was the effect of the settlement.

THE MASTER OF THE ROLLS. The decree must be according to the prayer of the bill, against the new trustee and the defendant Stafford. The concurrence in the appointment of a single trustee, with the transfer of the stock by Stafford and Braithwaite to such single trustee, was a plain breach of trust on their part, and made them responsible for the stock so transferred. This being the case, it is unnecessary to direct those inquiries for the examination of the solicitor who prepared the settlement and new appointment of trustees, which would otherwise have been necessary in order to discover who were the parties and privies to the fraud thus committed.

BRICKENKAMP v. REES.

(Supreme Court of Missouri, 1879. 69 Mo. 426.)

HOUGH, J. The plaintiff's intestate executed and delivered to the defendant, Rees, as trustee, a deed of trust of certain land in Franklin County, to secure the payment of certain notes to the defendant Jones, the cestui que trust in said deed. After default in the payment of the notes, and upon the request of the defendant Jones, the holder thereof, and after due notice given by the trustee of the time, terms and place of sale, and of the property to be sold, said land was sold, and the defendant Jones became the purchaser. Jones having refused to pay the purchase money, the present suit was instituted for specific performance. The separate answers of the defendants admitted the sale and purchase by Jones; and, with other defenses

in avoidance thereof, averred that the defendant, Rees, was not present at the auction. The Circuit Court found the issues for the defendant, and dismissed the plaintiff's petition. This judgment was affirmed by the court of appeals and the plaintiff has brought the case here by a writ of error.

The sale took place at the courthouse door in Union, the auctioneer or crier standing in the door, and the persons attending the sale, eight or ten in number, being inside the hall. The testimony as to the presence of the trustee during the sale was conflicting. Four witnesses testified that he was present, and three, including the trustee, testified that he was not. It is conceded that he was present at the courthouse door before the sale began, and that after the sale was over he went with the crier and the purchaser, Jones, into the collector's office a few feet distant from the door where the sale was made. The trustee testified that during the sale he was not at the courthouse, but in a saloon on the opposite side of the street, and that he was not present at the sale because he did not think it was necessary for him to be there. Some of the witnesses who testified that he was present were bidders, and were more observant, doubtless, of other matters than of the presence or absence of the trustee. The positive testimony of the trustee, who, so far as the record shows, is entirely disinterested, must, under the circumstances, be regarded as conclusive of his absence, especially as he is corroborated in this particular by the crier, who, in soliciting bids, would very naturally observe the entire assemblage, in as much as it was a small one.

The counsel for the plaintiff contends, however, that such absence from the place of sale as that testified to by the trustee, will not avoid the sale; that he was present at its conclusion to do all that he could have done, had he been present at the actual crying of the sale. In this, we think, the learned counsel for the plaintiff is in error. It was the duty of the trustee to be present during the crying of the sale, to observe the progress thereof, protect the interests of the parties concerned, to reject fraudulent bids made to frustrate the sale, and, if necessary, to adjourn the sale. *Graham v. King*, 50 Mo. 22, 11 Am. Rep. 401; *Bales v. Perry*, 51 Mo. 452; *Vail v. Jacobs*, 62 Mo. 130; *Perry on Trusts*, §§ 779, 780; *Gray v. Veirs*, 33 Md. 18. If, however, the auctioneer may lawfully make a sale in the absence of the trustee, and should, during his absence, accept a bid, declare the person making the same to be the purchaser, and by a proper memorandum in writing complete the sale, it would be out of the power of the trustee to set such sale aside. *White v. Watkins*, 23 Mo. 427. And in this way the trustee might substitute the auctioneer for himself in the exercise of that very discretion which the law declares is a personal trust and cannot be delegated by him. The trustee, himself, should be present to sanction the acceptance of the bid by the auctioneer before any binding memorandum of sale is made. Whether the sale was, in fact, judiciously conducted and advantageous in its terms to the debtor,

are questions not involved in the present inquiry. *Bales v. Perry*, 51 Mo. 452.

The judgment of the court of appeals will be affirmed.⁹⁰

PARKER, Trustee, v. JOHNSON and Others.

(Court of Chancery of New Jersey, 1883. 37 N. J. Eq. 367.)

On exceptions to Master's report.

THE CHANCELLOR [THEODORE RUNYON].⁹¹ The ninth exception is that the Master has allowed the trustee \$238.86 commissions on the rents collected, and has allowed him in addition five per cent on the sums disbursed; thus subjecting the rents to fifteen per cent commissions for collections and disbursements.

A trustee may employ necessary assistants in executing his trust, and pay them. He may employ agents, collectors, accountants and other persons properly employed in similar affairs. *Perry on Trusts*, § 912; *Wilkinson v. Wilkinson*, 2 Sim. & Stu. 237. No complaint is made in this case that the allowances to the agent and trustee are too great for the services and they do not appear to be so. * * *

Ex parte BELCHIER.

Ex parte PARSONS.

(In Chancery, before Lord Hardwicke, Chancellor, 1754. 1 Ambler, 218.)

On cross-petitions, and exceptions to the assignment of commissioners of bankrupt, the case appeared to be:

Mrs. Parsons was chosen assignee of the effects of her son, John Parsons, a bankrupt; and there being a large quantity of tobacco to be sold, she employed one Wiggan, a broker, to sell the same by auction.

⁹⁰ See *Taylor v. Hopkins*, 40 Ill. 442 (1866); *Grover v. Hale*, 107 Ill. 638 (1883); *Graham v. King*, 50 Mo. 22, 11 Am. Rep. 401 (1861); *Howard v. Thornton*, 50 Mo. 291 (1862); *Bales v. Perry*, 51 Mo. 449 (1863); *Vail v. Jacobs*, 62 Mo. 130 (1874); *Spurlock v. Sproule*, 72 Mo. 503 (1880); *Powell v. Tuttle*, 3 N. Y. 396 (1850); *Fuller v. O'Neal*, 69 Tex. 349, 6 S. W. 181, 5 Am. St. Rep. 59 (1887); s. c., 82 Tex. 417, 18 S. W. 479, 481 (1891); *Smith v. Lowther*, 35 W. Va. 300, 13 S. E. 999 (1891).

Contra: *Connolly v. Belt*, 5 Cranch, C. C. 405; Fed. Cas. No. 3,117 (1838); *Smith v. Black*, 115 U. S. 308, 6 Sup. Ct. 50, 29 L. Ed. 398 (1885); *Johns v. Sergeant*, 45 Miss. 332 (1871); *Tyler v. Herring*, 67 Miss. 169, 6 South. 840, 19 Am. St. Rep. 263 (1889); *Dunton v. Sharpe*, 70 Miss. 850, 12 South. 800 (1893).

Trustees may, however, delegate the performance of purely ministerial acts. *Gillespie v. Smith*, 29 Ill. 473, 81 Am. Dec. 328 (1863); *Telford v. Barney*, 1 G. Greene (Iowa) 575, 591 (1848); *Keim v. Lindley* (N. J.) 30 Atl. 1063, 1074 (1895); *Hawley v. James*, 5 Paige (N. Y.) 318, 487 (1835); *Blight v. Schenck*, 10 Pa. 285, 51 Am. Dec. 478 (1849); *Bohlen's Estate*, 75 Pa. 304, 317 (1874).

⁹¹ Only a part of the opinion is given.

The money was paid to the broker, and after remaining in his hands for about ten days, he died insolvent; and the commissioners were of the opinion the assignee ought to bear the loss.

It was proved by several persons' depositions, that it is the common method of business, to sell mercantile goods by auction, and to employ a broker, and for him to receive the money.

LORD HARDWICKE, Chancellor, after argument at bar: If Mrs. Parsons is chargeable in this case, no man in his senses would act as assignee under commissions of bankrupt. This court has laid down a rule with regard to the transactions of assignees, and more so of trustees, so as not to strike a terror into mankind acting for the benefit of others, and not for their own.

Courts of law and equity too, are more strict as to executors and administrators; but where trustees act by other hands, either from necessity, or conformable to the common usage of mankind, they are not answerable for losses.

There are two sorts of necessities: 1st. Legal necessity; 2nd. Moral necessity.

As to 1st: A distinction prevails where two executors join in giving a discharge for money and one of them only receives it, they are both answerable for it, because there is no necessity for both to join in the discharge, the receipt of either being sufficient; but if trustees join in giving a discharge, and one only receives, the other is not answerable, because his joining in the discharge was necessary.

2d. Moral necessity, from the usage of mankind. If trustee acts as prudently for the trust as for herself, and according to the usage of business.

If trustee appoints rents to be paid to a banker at that time in credit, and the banker afterwards breaks, the trustee is not answerable.

So in the employment of stewards and agents: The receiver of Lord Plymouth's estate took bills in the country, of persons who at the time were reputed of credit and substance, in order to return the rents to London: the bills were protested, and the money lost, and yet the steward was excused, 3 Atk. 480. None of these cases are on account of necessity, but because the persons acted in the usual method of business.

Objection: The goods were in a warehouse, but it does not appear the broker had a key to the warehouse; if he had, he would then be in possession of the goods; and if he had in such case embezzled any of them, Mrs. Parsons would not be liable for such loss. If she would not in such case of embezzlement, no more reason that she should in this case.

Objection: Mrs. Parsons herself might have received the money.

It is not usual to receive the money one's self; a question frequently happens, by reason of bankruptcy, as to goods, which are shipped but not imported, to whom they belong. In those cases, this court generally orders the goods to be sold, and the money paid into the bank,

for the benefit of the parties who shall be entitled in the event. But yet the broker is the hand to receive the money first.

Objection: She might have appointed another person to receive it.

The answer to that is: *Nil agit exemplum, quod litem lite resolvit.*

Objection: She might have taken security; but to do that upon every occasion would tend greatly to the hindrance of business.

Therefore of opinion Mrs. Parsons ought not to be charged with the value of the goods.

BOSTOCK v. FLOYER.

(In Chancery, before Sir John Romilly, Master of the Rolls, 1865. 35 Beavan, 603.)

In 1833 a sum of money was placed by Lord H. in the hands of Mr. Wilmot, in trust for the plaintiff, Mrs. Bostock.

In 1853 Mr. Wilmot employed a Mr. Conyers, a solicitor in Yorkshire in large practice and high repute, to procure an investment of £400.

Conyers obtained possession of the £400. and represented that he had laid it out on the mortgage of a copyhold property belonging to one John Patrick Stephenson, and he forwarded to Mr. Wilmot a parcel of deeds which was found amongst Mr. Wilmot's documents after his decease. This parcel contained (*inter alia*) a copy of what purported to be a surrender, dated 20th April, 1853, by John Patrick Stephenson, to the use of Richard Coke Wilmot, his heirs and assigns, of two closes, subject to a condition for making void the surrender on payment by John Patrick Stephenson of said sum and interest on the 7th day of the next ensuing July.

Interest was duly paid by Conyers to Wilmot and by him to the plaintiff from 1853 down to Wilmot's death in 1856, and the interest continued to be paid by Wilmot's executors or Conyers, from 1856 down to July, 1863.

In December, 1863, Conyers died, and in 1864 it was discovered that the alleged mortgage was a mere fiction, that the copy surrender to Wilmot had been signed by Conyers, the steward of the manor, but that no such surrender ever existed. It further appeared, that the property had been sold by J. P. Stephenson, to Conyers in 1856, and that he had mortgaged it to third parties.

Mrs. Bostock instituted this suit in 1864, to make Floyer, the executor of Wilmot, liable for the £400. and interest.⁹²

THE MASTER OF THE ROLLS. I am of opinion that the liability of this trustee is fixed by the ordinary doctrine of this court.

Here is a gentleman who accepts the office of trustee and receives £400, he gives it to his solicitor to invest, the solicitor puts the money into his own pocket and never invests it at all. It is the ordinary case

⁹² The statement of facts is abridged.

of a trustee who is liable for the default of his solicitor. Mr. Haynes thinks that there is some difference, because a surrender of copyholds is forged by a solicitor, who was a steward of the manor, and who writes a regular surrender of copyholds belonging to an existing person and sends it to the trustee as evidence that he had invested the money; but he was acting as solicitor for the trustee and was his agent. There is no receipt for the purchase money, and, on searching the rolls, it is found that the whole thing is a fiction. Roupell's case is distinguishable from the present, for there the forgery was not that of the mortgagee's solicitor. Here a man employs an agent who cheats him; the loss must fall on the trustee and not on the cestui que trust who never employed him.

I think the loss must fall on Wilmot, who selected this gentleman, and did not take the precaution he might have taken to see whether the mortgage had been made or not.⁹³

HOPGOOD v. PARKIN.

(In Chancery, before Sir John Romilly, Master of the Rolls, 1870. Law Reports, 11 Equity, 74.)

This was a suit by the children of Joseph Hopgood and Honor, his late wife, for the purpose of compelling James Parkin, the surviving trustee of the settlement executed on the marriage of their parents, and the representatives of Robert Govett, a deceased trustee, to make good the loss sustained by the investment of the trust funds on a security which had proved insufficient.

By a settlement dated the 3rd of March, 1842, and made on the marriage of Joseph Hopgood and Honor Davey, a sum of £10,000. 3 per cent consols in possession, and a sum of £7,218. 2s. 3d., 3 per cent Reduced Annuities in reversion expectant on the death of Maria Davey, was settled on the usual trusts for the husband and wife and issue of the marriage. The Rev. James Parkin and the Rev. Robert Govett (since deceased) were the trustees of the settlement, and the £10,000. consols were transferred into their names.

In 1855 the Rev. Robert Govett, William Govett Romaine and the Rev. John Clement Govett, who were trustees of another settlement (for the sake of distinction called the Govett family settlement), advanced £12,000. of the trust money belonging to that family to one Henry Ernest on the security of a mortgage of his estate at Llanon, in the county of Carmarthen.

The solicitor for the Govett trustees was Mr. Charles Albert Govett. Mr. Ernest's solicitor was Mr. John Charles Williams, a partner in the firm of Messrs. Goodwin, Williams, Edwards & Partridge.

⁹³ See *In re Dewar*, 38 W. R. 497 (1885); *In re Weall*, L. R. 42 Ch. Div. 674 (1889).

For the purpose of this mortgage the Llanon estate was valued by Mr. Petherick, a surveyor recommended by Mr. John Charles Williams. The value placed on the estate by him was £19,047.

In June, 1857, Mr. Ernest gave notice of his intention to pay off this mortgage. On the 15th of July, 1857, the mortgage was paid off, and the estate reconveyed to Ernest. For this purpose a temporary loan was in the first instance obtained from the Equity and Law Life Insurance Office; and then, in order to pay off this loan, John Charles Williams, the solicitor of Mr. Ernest, negotiated with Charles Albert Govett, who acted not merely as solicitor for the Govett trustees, but also as solicitor for the trustees of the Hopgood family, to get an advance out of the money settled on the marriage of Mr. and Mrs. Hopgood on the security of the estate. Maria Davey had then just died, and £7,218. 2s. 3d. Reduced 3 Per Cents had fallen into possession, and become subject to the trusts of the settlement. The advance was agreed to by Charles Albert Govett, and sufficient of both funds of £10,000. consols and £7,218. 2s. 3d. Reduced were sold out on the 31st of July, 1857, to produce £13,000., which was advanced on the security of a new mortgage by Ernest of the Llanon estate, dated the 3rd of August, 1857. The property comprised in this mortgage, however, was not exactly the same as that comprised in the former; about two-thirds of the estate included in the mortgage of 1855 was retained and other property equal in quantity and value to the one-third omitted was added to the new mortgage security. Mr. Govett, the solicitor, received for his services a lump sum of £250.; he made no new valuation, no new inquiries. Having in his possession the abstract of title delivered on the occasion of the mortgage of 1855, he did not require any fresh abstract; he never inquired whether there existed any prior incumbrances; and he apparently trusted entirely to John Charles Williams, who shortly afterwards became a bankrupt. The consequence was that it turned out, first, that the property on which the advance was made was worth about £16,000., instead of £19,000.; and, secondly, that there were two other mortgages on the estate, one dated the 18th of March, 1857, for £4,000. and interest at 6 per cent per annum, on the property included in the former mortgage, and another for £3,500, at 5 per cent per annum, dated the 1st of July, 1857, on another part of the property.

A suit of Hopgood v. Ernest was instituted to settle the priorities of these mortgages, which were severely contested. In this suit, after much litigation, only one of the two last mentioned mortgages was ultimately held to be prior to that of the plaintiffs. The property was sold, and it turned out, after taking the accounts of what was produced by the sale and what was due to the first mortgagee for principal, interest, and costs, that a loss of £6,555. 6s. 3d., or thereabouts, had been sustained by reason of this advance by the trustees, and that nothing could be recovered from Mr. Henry Ernest personally.

Honor Hopgood died in 1864.

LORD ROMILLY, M. R. This case involves to some extent a question of very considerable importance which, broadly stated and without qualification, is shortly this: If trustees are defrauded, and by reason of the fraud practiced upon them lose part of the trust estate, does the loss fall upon them or upon their *cestuis que trust*? In *Eaves v. Hickson*, 20 Beav. 136, I held that if a person obtained trust property from trustees by means of a forgery, the loss fell on them and not on the *cestuis que trust*. Here the trustees advanced trust money on a property sufficient to cover the mortgage if it were the first mortgage—the fact of the existence of a prior mortgage was carefully concealed from them; does the loss fall on them or on their *cestuis que trust*? Though, in my opinion, this is the point which lies at the bottom of the question to be decided here, yet there are in the present case many qualifying circumstances on both sides which must be considered, and which renders it necessary shortly to refer to the facts which are proved in this cause: [His Lordship stated them, as above.]

The question is, on whom does this loss fall? First, it is material to consider the course pursued by the solicitor of the trustees. It is true that his conduct is not theirs; but he is appointed by them, he is their agent for the management of the affairs of the trust, and if he misconducts himself through ignorance or negligence, or wilfully, he is answerable to the trustees, and they cannot, in my opinion, throw any of the loss thereby incurred on their *cestuis que trust*. Now what is the conduct of the solicitor in this case? It does not involve one iota of moral turpitude. He acted, I have no doubt, as he believed, for the best for all parties; but in so acting he did not display the caution and vigilance which is to be expected from and is usually displayed by a solicitor for his client. The dates of the mortgages plainly show this. The mortgage of the Llanon estate to the Govett trustees was on the 13th of October, 1855. The mortgage to the Hopgood trustees was on the 3rd of August, 1857. In the meantime, on one part of the property included in the former mortgage, a mortgage for £4,000., with 6 per cent interest per annum, had been effected by Ernest, the mortgagor, by an indenture dated the 18th of March, 1857; and on another part of the property a mortgage had been effected by Ernest, the mortgagor, for £3,500., with interest at 5 per cent per annum. It is true that this latter mortgage, though prior in date, was postponed to the Hopgood trustees' mortgage but it was so after much expensive litigation, the cost of which, when added to the debt, increases the deficiency of the estate.

Though both these mortgages had been effected in the interval between the mortgage with Govett's trustees and that to Hopgood's trustees, yet Mr. C. A. Govett, the solicitor, never inquired whether any fresh incumbrances had been created, nor did he require a fresh abstract to be delivered. Whether John Charles Williams would, if applied to, have disclosed the fact of there being two fresh incumbrances, or whether, if required to furnish an abstract continued down to

August, 1857, he would have concealed these facts, it is not, in my opinion, material now to consider. If he had done so, and wilfully and knowingly deceived Mr. C. A. Govett by assertion of what was false, or by the suppression of what was true, it might have altered the character of the case and the liability of the trustees. But the trustees are bound to employ competent persons, and if they do not the loss must fall on them. The reason which Mr. Govett gives for not asking for a fresh abstract is singularly inappropriate; it is that he had already got it. This is true, but it came down to October, 1855. What he wanted was an abstract down to August, 1857; or, if he dispensed with that, he should have required a statutory declaration that no fresh charge had been created on the property. All this he neglects, yet he takes a liquidated sum for costs, as if he had gone regularly through the investigation of title afresh, in the ordinary manner. The valuation, also, is very unsatisfactory. Mr. Govett, for this first mortgage, employed Mr. Petherick, on the recommendation of the mortgagor's solicitor, and he appears to me to have valued the property considerably above its real value; but this is not so material as the omission to require that an abstract should be furnished bringing the title down to the time of the transaction in question, or, if not, the proper evidence should be furnished that no further incumbrance had been created prior to the 3rd of August, 1857, when the trustees were about to advance the money. If the trustees of the Hopgood family had paid off the mortgage to Govett's trustees, and taken an assignment of it as a subsisting mortgage, it would have been different; but they do nothing of the sort, they only require evidence to show that the first mortgage to Govett's trustees had been paid off; and without anything to show that fresh incumbrances had not been created, and thus without evidence and without inquiry, they advance the money at once, obtaining only a second mortgage on a property insufficient even for a first incumbrance to that amount. I use the expression "they do this," because it is exactly the same if it be done by the trustees themselves personally or by an incompetent or negligent agent. They must, therefore, bear the loss and not the *cestuis que trust*, whom they were appointed to protect.

The consequence is that I must make a decree compelling the surviving trustee, Mr. Parkin, and the executors of the deceased trustee, Robert Govett, to make good the loss sustained by the trust fund in the circumstances I have above detailed of its having been advanced on an insufficient security; for which purpose the proper and necessary accounts must be taken, with liberty to the Chief Clerk to adopt the accounts taken in the suit of *Hopgood v. Ernest*; and if the executors of Robert Govett, the deceased trustee, do not admit assets sufficient for this purpose, there must be the usual account of his estate, and the trustees must pay the costs of this suit. Of course, I shall give C. A. Govett no costs; but I cannot make him pay anything in this suit.

SPEIGHT v. GAUNT.

(In the Court of Appeal, 1882. Law Reports, 22 Chancery Division, 727.)

By his will dated the 16th of February, 1875, John Speight bequeathed all his real and personal estate to Isaac Gaunt and Alfred Wilkinson, whom he appointed trustees and executors of his will, upon certain trusts. He died March 31, 1877.

Some of the securities had been sold by one Cooke, a stockbroker doing business at Bradford, and the proceeds paid into the Bradford Bank to the credit of the trust account. Subsequently Cooke was employed by Gaunt to buy £5,000. stock of each of the corporations of Halifax, Huddersfield and Leeds.

On the 24th of February, 1881, Cooke brought to Gaunt a "bought note," filled up on a printed form as follows:

"John Cooke & Son, Stockbrokers,

Exchange Bank Street, Bradford, Feb. 24, 1881.

"To the executors of the late John Speight:

"We have this day bought for you as per your order, subject to the rules of the London Stock Exchange:

		Commissions
£ 5,000.	Leeds Corporation Debenture Stock	105½ nett
5,275.		
5,000.	Huddersfield do.	100 nett
5,000.		
5,000.	Halifax do.	100 nett
5,000.		

£15,275.

"Account

[Signed] John Cooke & Son."

Cooke said he wanted the money for these stocks to pay next day. Gaunt signed three checks for £5,000. each to the order of Messrs. John Cooke & Son. Cooke misapplied these checks to his own use, filed a liquidation petition and then absconded.

Certain of the cestuis que trust brought their action against Gaunt for a breach of trust and asked that he make good to the estate the loss with 4 per cent interest.

Vice Chancellor Bacon decreed that Gaunt make good the £15,275. (within 6 months) with interest at 4 per cent and costs.

From this decree Gaunt appealed.

LINDLEY, L. J.⁹⁴ This case appears to me to be one of very great importance, not only to Mr. Gaunt and the cestuis que trust, but also to trustees in general who have to invest money or do invest money through brokers.

⁹⁴ The concurring opinions of Jessel, M. R., and Bowen, L. J., are omitted. The House of Lords affirmed, 9 App. Cas. 1 (1883).

The first observation to be made is that this is a case in which the trustee is not even accused of having acted in any way with a view to his own benefit, or otherwise than with perfect bona fides and honesty, a remark which of course is important, because one approaches such a case in a different state of mind from that with which one would approach a case if one were dealing with a dishonest trustee.

The next remark is that the trust for investment was so worded that nobody pretends that the investment of the trust property in debentures or debenture stock of these corporations was not within the investment clause. It is not suggested that it would be a breach of trust on the part of the trustee in this case to invest the trust money in that kind of securities in which he directed the broker to invest it.

Now what the trustee did in this case was this. Some of the trust moneys to the extent of £13,000. had been paid over, and in that transaction Mr. Cooke, I understand, had been employed. He was the family broker. He was not the broker whom Mr. Gaunt generally employed in his own business, but he was a person recommended by the family. I do not attach much importance to that, but it is a circumstance which should, I think, be mentioned. Mr. Cooke at the time was a broker in good repute. He was a person to whom an ordinary prudent man desiring to employ a broker in Bradford would have recourse. Then Mr. Gaunt, being desirous of investing £15,000. in debentures or securities of these corporations, intrusts Mr. Cooke to make the investment.

The first point that occurs to my mind is this, Was it proper for the trustee to employ Mr. Cooke in the transaction at all? Because if it was not, I take it that the trustee must be responsible for the consequences. A trustee has no business to cast upon brokers or solicitors or anybody else the duty of performing those trusts and exercising that judgment and discretion which he is bound to perform and exercise himself. On the other hand, a trustee is not bound to do everything himself. A trustee is entitled to employ a broker and solicitors to do that which in the ordinary course of business other people would employ brokers and solicitors to do.

The real importance of this case is, that it lies between these two propositions—that a trustee cannot delegate his trust, and that, on the other hand, he is entitled to employ persons to do that which an ordinary man of business would employ an agent to do. Now, looking at the matter fairly and properly as a business man would look at it, can it be said to be an improper thing on the part of a trustee who is desirous of investing £15,000. in this class of securities to go to a broker? That he might have acted otherwise is plain enough; but was it a reasonable and proper thing not to apply to the secretaries or treasurers of these corporations, but to employ a broker for that purpose? So far as the evidence goes, it appears to me that on the balance of the evidence it is impossible to say that this was an improper step for a trustee to take. Although business men can do these things for

themselves, unless we can go the length of saying that the employment of Mr. Cooke was an improper delegation of the trust or an improper employment, it will follow that it was not an unreasonable thing or a breach of trust to employ a broker to do this kind of work; and the conclusion that I have arrived at on that point is that we cannot say the trustee, acting honestly, was not entitled to employ a broker to do this kind of business.

Then the next thing is, what did Mr. Gaunt employ Mr. Cooke to do? He employed him to invest this money in these securities. He did not tell him or suggest to him how it had better be done, he did not know, and I do not think he was bound to ascertain, whether these securities were in the market in the ordinary commercial sense, or where Mr. Cooke was to get them from; he left that to Mr. Cooke's discretion, and I think he was not guilty of negligence in so doing. Mr. Cooke told him he would get them for him. There had been apparently some discussion as to the class of bonds, Mr. Gaunt preferring to have Halifax bonds, and although Mr. Cooke said there would be some difficulty about Halifax bonds, the result is that he comes to Mr. Gaunt and says that he has got them, that is that he has got £5,000. Halifax corporation debenture stock. I do not attach much importance to the distinction pointed out between debentures and debenture stock. The substance of the thing is what was wanted was securities of these corporations, whether debentures or debenture stock. Nothing turns upon that so far as I can see. Mr. Gaunt would have been satisfied with either, and either would be within the trust.

I now come to the bought note, which is a very important document, and I confess I cannot look at it from the same point of view as Vice Chancellor Bacon did. The bought note is a printed form, filled up, of course, with a pen. Judging from the words of the document, and from the appearance of it, and bringing to bear upon it the knowledge which every one has of the ordinary transactions of business, I confess this document would have completely misled me. I could not possibly, looking at it with the utmost care and vigilance, such as an ordinary man would exercise, extract from this document the slightest information or notice that this was a purchase other than in the ordinary course of business on the Stock Exchange. If it would mislead a person like myself, why should it not mislead others? I am quite aware that experts have been called who say that, to their experienced eyes, there are signs on this document which indicate, to them at any rate, irregularities; but the question is not whether experts like brokers or those who are accustomed to deal in these things see irregularities; the question is, whether these signs of irregularity are such as would attract the attention of an ordinary prudent man of business.

There is no irregularity of that sort at all in it that I can discern. It is a question of fact, and not a question of law, whether upon the face of this document there are or are not such signs of impropriety

as to excite the suspicion of anybody. Nobody suggests any, except that the experts say that there are signs which would put them on inquiry.

Now the signs which are visible to them are apparently these: First of all, the absence of the name of the selling broker, of which I do not think much; and, secondly, the fact that there is nothing charged for stamps or commission, and no date for the settlement of the account. The absence of a charge for commission is explained by the fact that in the commission column, the word "commission" being in print, under it is written "nett," that is to say that the purchase was to be for a nett price. Then it is said that the word "account" being printed, it ought to have been followed by a date, and that a broker would look with suspicion on a document with the word "account" in it not followed by the date. I do not pretend to say that there are not signs of suspicion to the eyes of a broker, but we are not looking at it with the eyes of a broker. We are looking at this document with the eyes of ordinary men of business, and there is so evidence to show that there is anything which would lead an ordinary man of business to suppose that there was anything wrong. I am not able to come to the conclusion that Mr. Gaunt was put on inquiry, or ought to have been put on inquiry, as a reasonable and cautious man. If anything was calculated to lull suspicion in his mind, this document was, in my opinion, calculated to do so. That he was deceived is plain enough upon the evidence, but I cannot see that blame is to be imputed to him for not suspecting that there was something wrong. Upon this point, and it is a question of fact not of law, I differ from the Vice Chancellor, who seems to have been more impressed than I am with the evidence of the experts, and to have looked at this paper with the eyes of an expert, and too little with the eyes of an ordinary man of business.

Now, assuming that the trustee was justified in employing Mr. Cooke, and assuming that he was not negligent in not having his suspicions aroused when this document was brought to him, the next question is, was he acting improperly in paying the purchase money to the broker? That is to say, ought he, as a prudent man of business, to have paid it to somebody else, namely, to the principals from whom the broker ought to have got, but did not get, these securities, whether upon the Stock Exchange or otherwise? If the trustee had notice, and really did know that these things had not been bought on the Stock Exchange, it is quite possible that he ought so to have paid it. I say nothing about that. It might be that in that case the trustee would be bound to see further into the application of the money; but, misled as he was, and entitled as he was to treat these things as bought by the broker in the ordinary way of his business as a broker on the Stock Exchange, it appears to me that it is perfectly impossible to hold that he was bound to see to the application of the money, in the sense that he was bound to pay the persons with whom the broker negotiated the pur-

chase. We know the way in which business is done through brokers in buying ordinary stock. If a broker buys £10,000. of stock there are sometimes half a dozen people from whom he gets the stock. It is not in the ordinary course of business for a buyer, whether a trustee or not, to pay to persons from whom the broker has bought; he pays the broker. He is entitled to do that by the ordinary course of business. I do not myself understand that there is any evidence that, in point of fact, a trustee or any other person employing a broker to buy could do it in any other way. As a matter of business I believe he could not. At all events, the evidence is conclusive that the ordinary practice in employing a broker on such occasions is to send a check to the broker. There was, therefore, no negligence in Mr. Gaunt doing so; there was no impropriety or breach of trust in his conduct up to this point.

Then if we look a little farther, we shall see how the thing was done. Mr. Gaunt did not find out, nor could he by reasonable diligence have found out anything which would lead him to stop his own checks. If anything could be brought home to him to show that he was negligent in not stopping his checks the case would have been quite different; but there was nothing to justify him in doing so, there was nothing sufficient to excite his suspicion.

Then it is said that there was negligence in not getting the securities. If the ordinary course of business had been that the securities should be exchanged for the checks, of course it would be different; but that is not the ordinary course of business. You pay the broker and he gets you the securities. He sees to all that. That is the ordinary course of business. It is very true that the broker did not fail for three weeks or a month afterwards, but so far as the evidence goes it seems to me clear to demonstration that no discovery Mr. Gaunt could have made after the checks were cashed could have saved the property. If he was not negligent in not looking after the matter during the month, I do not see that the lapse of time or the so-called negligence caused the loss. The loss was anterior to that negligence, if negligence there were. I have made these observations in consequence of the passage that has been read from the judgment of the late Lord Hatherly in *Mendes v. Guedalla*, 2 J. & H. 259. I have looked at the case since it was cited, and it appears to me, having regard to the facts which were before the court, that the passage which was read does not go to the length contended for, so far as I can understand it. In that case there was negligence in not looking after the securities, the negligence was long continued, and but for that negligence and if inquiry had been made the securities might have been got back. The charge there was that the trustees trusted the agent for several years, and that they put the securities in a box and never asked anything about them. There is no doubt that in that case there was not only negligence, but the evidence was such as to show that but for the negligence the loss would not have been incurred. As to Mr. Gaunt

not asking for and not getting these securities, the time was short, and the misappropriation of the fund had taken place, and I am satisfied myself that the loss would have been sustained all the same if he had asked for them. In other words the cause of the loss was not the want of inquiry by Mr. Gaunt, but the fraud which was practiced upon him.

Now I do not propose to go through the authorities, but I will advert to two cases, because they have been brought to the attention of the court and they require notice. One is *Bostock v. Floyer*, in which Lord Romilly held that a man was responsible for the sum of £400. which he had given to his solicitor to invest. The solicitor had pretended to invest it on a mortgage of some copyholds, but he had not done so, and the money was lost, and the trustee was held responsible. As I understand it the ratio decidendi of the case was this, that it was not the ordinary course of business for a trustee to place money in the hands of a solicitor to invest. It was not a specific investment, it was handed to the solicitor, and in that point of view the case is intelligible enough upon the ground that it was not right for the trustee to hand over the money to the solicitor for the purpose of investment. The other case was *Hopgood v. Parkin*, cited by Mr. Millar. That case certainly goes much further than I should have thought right; but in the result the case was appealed. An infant was concerned, and the Court of Appeals sanctioned a compromise on behalf of the infant.

I wish most emphatically to say that if trustees are justified by the ordinary course of business in employing agents, and they do employ agents in good repute and whose fitness they have no reason to doubt, and employ those agents to do that which is in the ordinary course of their business, I protest against the notion that the trustees guarantee the solvency or honesty of the agents employed. Such a doctrine would make it impossible for any man to have anything to do with a trust.⁹⁵ I differ from the Vice Chancellor upon the question of fact: the principles of law, which he stated in the first part of his judgment are entirely sound, but I differ from the conclusion at which he arrived on the bought note, and so differing from him I can not agree with the judgment which he pronounced.

Re PARTINGTON.

PARTINGTON v. ALLEN.

(In Chancery, before Stirling, Justice, 1887. 57 *Law Times Reports*, 654.)

In this case an originating summons was taken out by Mrs. Partington, one of the trustees of the will of the testator, W. H. Partington, asking for a declaration that the trustees were not chargeable with

⁹⁵ See *In re Bird*, L. R. 16 Eq. 203 (1873); *Rochfort v. Seaton*, [1896] 1 Ir. R. 18; *Christy v. McBride*, 2 Ill. 75 (1832); *Holeman v. Blue*, 10 Ill. App. 130 (1881).

any breach of trust in respect of their having invested moneys subject to the trusts of the will upon certain securities therein mentioned; or that if any such breach of trust was chargeable it might be declared that the defendant Allen was primarily liable in respect thereof, and he might be ordered to make good any loss occasioned thereby. The defendants were Mr. Allen, the other trustee, and Mr. James Partington, a son of the testator, and one of the beneficiaries under the will. The testator died in 1876, having by his will, dated the 29th of May, 1875, appointed his wife (the plaintiff), J. Janion (since deceased), and the defendant Allen, with whom he had been in partnership as a solicitor, his trustees and executors. After certain bequests and directions, he directed that his trustees should appropriate out of his personal estate and invest £30,000., and pay the income to his wife during widowhood, and after her death, or second marriage, that sum was to fall into the residue, which he directed to be held upon certain trusts in favor of his children by a former marriage. The investments authorized for the trust funds were (*inter alia*) freehold, copyhold, or leasehold securities in England or Wales (such leaseholds, if for years, having sixty years to run). And the testator directed that his trustees, J. Janion, or the defendant Allen, if he should be employed as the solicitor to his trustees, should be allowed all professional charges.

The trustees made various investments from time to time, and, amongst others, the three mortgages out of which these proceedings arose, viz., a mortgage for £2,500. on a freehold property at Stalybridge, and two mortgages for £2,400. and £1,500. respectively on land and houses at Goole. All of these mortgages carried interest at 5 per cent. The Stalybridge property consisted (according to the particulars given by the proposed mortgagor) of a public house, rent £200.; three cottages, rent 3s. each, £23. 8d.; and six-stall stable and coachhouse, at a rent of about £30., and some land, the whole subject to a chief rent of £6. 18s., and producing altogether a rent of £246. 10s. With reference to this security, Allen, on the 8th Jan., 1878, wrote to a firm of surveyors, at Manchester, as follows:

"We shall feel obliged if you will value the freehold property at Stamford street, Stalybridge, whereof the particulars are contained in the plan sent herewith, and are also described on the other side. The valuation is required for mortgage purposes, and your valuation should state not only the value of the property, but also the maximum amount which might in your opinion be safely lent by way of first mortgage thereon by trustees. We understand that the George Hotel was opened only on the 13th Oct. last as a fully licensed house, and that the present tenant thereof is the son-in-law of Mr. John Marsland, the owner of the property, who has informed us that he resides also in the hotel. * * * You will be good enough also to check the correctness of the rentals, and insert the particulars of the tenancies in your valuation."

The surveyors wrote in reply, saying that they had surveyed the property, which they described, stating it to be subject to an annual chief rent of £6. 10s., and that in their opinion the value of the whole was £4,174., and it was a good and sufficient security for an advance on mortgage of £3,130. Mr. Allen subsequently saw the surveyors and pointed out that they had not stated whether they had checked the rentals, when they replied that they had done so, and that the rents then payable were correctly stated in the particulars set out in his letter. Upon this £2,500. was advanced upon this security.

As regards the mortgage for £2,400. on property at Goole, Allen, in the name of his firm, on the 30th of March, 1878, wrote to Fox and Sons, surveyors of Leeds, the following instructions:

"On the other side we send you short particulars of a property at Goole, upon which we have been requested to lend some money on mortgage, and which our clients will be prepared to do subject to your furnishing us with a satisfactory valuation of the property. We do not know who are the owners of the property, but the business has been introduced to us by Mr. Gardiner, of the ——— Office, Leeds, and to whom we have sent this letter for delivery to you in order that he may negotiate with you respecting the amount of your fee for making the required valuation, but for payment of which we, as between you and ourselves, are of course responsible. Please take care to state in your valuation, not only what you consider to be the valuation of the property, but also the amount which may safely be advanced on mortgage thereon, and of course a better identification should be inserted in the valuation than appears in the particulars."

The letter then went on to say that Messrs. Fox would of course exercise their independent judgment as to the valuation of the property, but giving them a reference to a person at Goole if they wanted information as to it, or the tenants, or the possibility of its always being well tenanted, whatever might be the state of trade or otherwise in Goole for the time being.

The particulars (as furnished by the proposed mortgagor) were:

"Freehold property, situate in Goole, and comprising twenty-one houses, let at 4s. per week each—£218. 8s. One house and shop let at an annual rent of £20.—£238. 8s.; less rates, etc., £21.; total valuation £217. 8s."

Messrs. Fox, on the 10th April, 1878, made a report that the property consisted of modern and substantial dwellings, occupying an acre of 1,770 square yards, and produced a net rental of £217., and that they were of opinion that the property was worth £3,884., and was a very ample security for a loan on mortgage of £2,000.; that the property was generally fully occupied, and the leakages trifling.

On the 11th April, 1878, Allen wrote to Mrs. Partington, inclosing particulars of this security, which, he said, had been recently submitted to him, and "so necessary was it in order to retain the first option of accepting or declining the same, that I at once instructed Messrs. Fox

and Sons * * * to inspect and value the property without delay, and I inclose also copy of their valuation." He also said that they were at liberty to decline the security if either of them thought fit, but he should regret the loss of the same, having regard to the great difficulty of now obtaining good mortgage securities at 5 per cent.

On the 16th May Allen again wrote to Mrs. Partington, saying that Mr. Middlewood, the owner of the property, had informed him that he could dispense with obtaining a further loan for £800., if the trustees would lend £2,400., instead of £2,000. only, on the property referred to in the valuation of the 10th April; that he had at once written to Messrs. Fox, asking whether they could advise the loan being increased, and heard from them that the property was a very ample security for such increased sum, and said, "I presume you will agree with me in deciding to let the same be advanced." Messrs. Fox had on the 15th May 1878 altered their valuation of the 10th April by adding in red ink, after £2,000., the words "or £2,400. if required." Mrs. Partington agreed to the proposal and the £2,400. was advanced.

In the case of the £1,500. mortgage, the particulars were not materially different from those in the case of the other two, and need not be stated in the report.

On the 24th Jan., 1879, Mr. Marsland was adjudicated bankrupt, and in March, 1879, Mr. Middlewood liquidated his affairs by arrangement. Default having been made in payment of the interest under the mortgages, the trustees entered into possession of the several properties, and shortly afterwards put them up for sale, but no sale was effected, the highest bids being less than the amounts advanced. In August, 1885, the Stalybridge property was sold for £1,000., and the two properties at Goole were subsequently sold together, under an order of the court, for £1,600.

Under these circumstances the plaintiff took out her summons. On the 13th May, 1886, an order was made directing inquiries, and on the 30th April, 1887, the Chief Clerk made his certificate. He found that the mortgage on the Stalybridge property was a proper investment, but that the other two mortgages on the properties at Goole were improper investments, and the trustees were responsible for the same.

Summonses were taken out by the different parties to vary this certificate. The plaintiff and the defendant Allen asked that the second and third mortgages might be stated to be proper investments, and the defendant Partridge that the first mortgage might be declared to be an improper investment. They were adjourned into court, and now came on for hearing. This was also the further consideration of the action. It was arranged that the question of the liability of the trustees to the cestuis que trust should be dealt with first, and the question between the two trustees afterwards.

STIRLING, J. These summonses raise the question, which is always an unpleasant one, whether certain investments on mortgage which

have been made by the trustees of the will of the testator in the action are improper investments, and, if so, whether the trustees, or either of them, are, or is, responsible for the loss which has been occasioned to the trust estate. Now, the law on the subject has been recently considered to a very considerable extent, both by the Courts of first instance, and by the Court of Appeal, and by the House of Lords, particularly in two cases of *Re Speight*; *Speight v. Gaunt*, and *Re Whiteley*; *Whiteley v. Learoyd*. In the case of *Speight v. Gaunt*, when before the Court of Appeal, 48 L. T. Rep. N. S. 279; 22 Ch. Div. 727, the Master of the Rolls (Sir George Jessel) says this: "In the first place, I think we ought to consider what is the liability of a trustee who undertakes an office which requires him to make an investment on behalf of the cestui que trust. It seems to me that on general principles a trustee ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own, and that beyond that there is no liability or obligation on the trustee." In the case of *Whiteley v. Learoyd*, which came before the Court of Appeal, that was commented upon, and accepted, subject to this qualification, laid down by all the judges, I think, in the Court of Appeal, but more particularly by Lindley, L. J. He says: "I accept this principle"—which is the one that I have just read—"but, in applying it, care must be taken not to lose sight of the fact that the business of the trustee, and the business which the ordinary prudent man is supposed to be conducting for himself, is the business of investing money for the benefit of persons who are to enjoy it at some future time, and not for the sole benefit of the person entitled to the present income. The duty of a trustee is not to take such care only as a prudent man would take if he had only himself to consider; the duty rather is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide." That is one principle which is always to be had regard to in considering the propriety of an investment. Another principle, which is also laid down in both cases, is this: that a trustee is not bound to do everything in executing the trust himself; he may avail himself of the services of people whose assistance or advice he requires. For example, he may avail himself of the assistance of a broker, if the investment is one which requires the services of a broker; of a valuer, if the investment be one, such as the purchase or mortgage of land, which requires the services of a valuer; and he can avail himself of the services of a solicitor as regards matters as to which he requires legal advice and assistance. But that, again, is subject to this qualification; that he must not, in availing himself of the services of such persons, delegate to them the duties which, by accepting the trust, he has agreed himself to perform. In *Speight v. Gaunt*, Lindley, L. J., says: "A trustee has no business to cast upon brokers, or solicitors, or anybody else, the duty of performing those trusts, and exercising that judgment and discretion, which he

is bound to perform and exercise himself. On the other hand, a trustee is not bound to do everything himself. A trustee is entitled to employ brokers and solicitors to do that which, in the ordinary course of business, other people would employ brokers and solicitors to do. The real importance of this case is, that it lies between two propositions—that a trustee cannot delegate his trust, and that, on the other hand, he is entitled to employ persons to do that which ordinary men of business would employ an agent to do. Now, looking at the matter fairly, and properly, as a business man would look at it, can it be said to be an improper thing on the part of a trustee who is desirous of investing £15,000. in this class of securities to go to a broker? That he might have acted otherwise is plain enough, but was it a reasonable and proper thing not to apply to the secretaries or treasurers of these corporations, but to employ a broker for that purpose? So far as the evidence goes, it appears to me that on the balance of the evidence it is impossible to say that this was an improper step for a trustee to take. Although business men can do these things for themselves, unless we can go the length of saying that the employment of Mr. Cooke was an improper delegation of the trust, or an improper employment, it will follow that it was not an unreasonable thing or a breach of trust to employ a broker to do this kind of work; and the conclusion that I have arrived at on that point is that we cannot say the trustee, acting honestly, was not entitled to employ a broker to do this kind of business. Then the next thing is, what did Mr. Gaunt employ Mr. Cooke to do? He employed him to invest this money in these securities. He did not tell him or suggest to him how it had better be done; he did not know, and I do not think he was bound to ascertain, whether these securities were in the market in the ordinary commercial sense, or where Mr. Cooke was to get them from. He left that to Mr. Cooke's discretion, and I think he was not guilty of negligence in so doing." Those qualifications were again observed upon and enforced by all the judges of the Court of Appeal in *Whiteley v. Learoyd*, and *Lindley, L. J.*, whose judgment I will read, because he puts it shortly and clearly, refers to that in these terms. In dealing with the investment which had been made in that case, he says: "One observation applies to both of them, viz., that the trustees acted bona fide, and obtained and acted on the advice of a solicitor and valuer who were apparently competent men in their respective professions. It was contended on behalf of the trustees that this circumstance alone was enough to exonerate the trustees from liability. But this contention goes too far. If it were to prevail, the court would, in effect, decide that trustees could delegate their trust to any competent persons, and so terminate their own responsibility. This, however, trustees cannot do. They may and must seek advice on matters they do not themselves understand; but, in acting on advice given to them, they must act with that prudence which I have already endeavored to describe." So that therefore the result of these two cases is this:

that trustees may avail themselves of the assistance and advice of other persons in the ordinary course of business; but that, having obtained that advice and assistance, they are not to adopt it blindly, but exercise on it the judgment which an ordinary prudent person, acting in the way described by Lindley, L. J., would act in reference to his own matters. So much for the general principle by which trustees are to be guided. But, with reference to investments on mortgage, there is something still further to be considered. This court and its officers from long experience have arrived at what I cannot call a rule of law, but a general result of experience, as to the extent to which trustees may safely go in making advances upon real security. The rule has again been considered in recent cases, and particularly by Kay, J., in the case of *Fry v. Tapson*, and in the case of *Re Olive*; *Olive v. Westerman*. He states the rule in the last case from Mr. Lewin's book on Trusts, in these terms: "Trustees cannot be advised to advance more than two-thirds of the actual value of the estate, if it be freehold land; and if the property consists of freehold houses, they should not lend so much as two-thirds, but, say one-half of the actual value. The rule, however, of two-thirds, or one-half, is only a general one; and where trustees have lent on the security of property of less value, but have acted honestly, they have been protected by the court, and have been allowed their costs. As to buildings used in trade, and the value of which must depend on external and uncertain circumstances, trustees will not in general be justified in lending so much as one-half." Then the learned Judge continues: "No one ever said that the rule as to lending not more than one-half the value of house property was a hard and fast rule. Of course, when applying that rule, all the circumstances must be looked at. But surely trustees when they are lending trust moneys upon house property, knowing, as I must take them to know, the rule which has been certainly followed since 1836, should tell their valuers that they are lending trust moneys, and that they do not desire to lend more than one-half the actual value of the property. They should ask for a valuation which would enable them to judge whether they are justified in loaning the amount they propose to loan." Now that rule is certainly one which in the chambers attached to this court is constantly acted on. If, for example, an application is made in an administration action by trustees for the sanction of the court to lend money on mortgage, and the valuation was produced, the first thing the Chief Clerk would consider would be whether the amount proposed to be advanced was within the limit stated in that rule, and if it exceeded that limit, the person proposing to make the advance would immediately be required to make an explanation, and to justify his proposal. It appears from the judgment which I have just read of Kay, J., that trustees may now be supposed to know this rule, and have regard to it; and certainly if, in point of fact, a trustee is found to know it, and he is found to deviate from it, I apprehend there is

no question but that he is called on to justify what he does, and to explain how he came to deviate from the rule thus laid down. Now, in the present case, the trustees who have made these investments are trustees both of whom are named in the will. They are the tenant for life, the widow of the testator, who was himself a solicitor, and his partner in the business of a solicitor, Mr. Allen. [His Lordship referred to the terms of the will, and continued:] The trust estate has been, to a very large extent, invested on mortgage. It appears that not fewer than twenty mortgages for various sums have been taken by the trustees as investments, all of them, I think, with the exception of one, carrying interest at 5 per cent.; and it appears from the admissions which have been put in evidence with reference to the bills of costs, that bills of costs to a considerable amount have been paid in respect of the work done by Mr. Allen's firm for the estate, and in connection, as I understand, with these mortgages and otherwise. Mr. Allen took the more active part, to say the least, in making these investments, which are now called in question, and I propose first to deal with the case as between the cestuis que trust and with him, and then afterwards to consider the liability of Mrs. Partington, his co-trustee. Now a trustee, when his conduct with reference to an investment on mortgage is challenged, has two courses open to him. He may, in the first place, say that he, in making the investments, acted as an ordinary man of prudence would do; that he employed a proper solicitor and a proper valuer; that he gave them all proper and necessary instructions; that he received from the solicitor and from the valuer opinions and valuations which, on the face of them, justified him in acting as he did; and he may say that that being so, if it turns out there is a mistake in the opinion or the valuation, on the faith of which he acted, that is the misfortune of the cestui que trust, but is not to be attributed to him as a fault. In the cases which I have to consider that defence is relied on. Then the trustee has also got what I may call a second line of defence. Supposing it turns out that the valuations or opinion cannot be relied on, it is still open to him to show that, notwithstanding that, the investment is such as an ordinary man of prudence would have made at the time, and that it is a proper security. In that case the burden of showing it, I apprehend, clearly lies on the trustee who asserts this to be the case. [His Lordship then stated the facts as to the advance upon the Stalybridge property, and continued:] Now, upon these instructions, some observations occur. In the first place, Mr. Allen so far complies with the rule laid down by Kay, J., that he informs the valuer that the proposed lenders are trustees. But he does not follow the rule completely, because that is only half of what Kay, J., said. Kay, J., said trustees "should tell their valuers that they are lending trust moneys, and that they do not desire to lend more than one-half the actual value of the property." Therefore, he did not completely comply with the requirements as laid down by Kay,

J., and it was the more imperative on him to do that in this case, because the property is not mere house property, as was the case in *Olive v. Westerman*. It partly consisted of an hotel, and the rent might depend to a considerable extent on the license, and on the speculative nature of the business that was carried on there. Therefore I think he ought to have directed the attention of the surveyors to that subject, and have ascertained actually what value could be attributed to the property independently of its occupation as an hotel. But I think there is more than that. The property is stated in the letter, and was known to Mr. Allen to be in the occupation of the son-in-law of Mr. Marsland, and he also knew that Mr. Marsland, the owner, himself resided in the hotel, and that it was only opened as an hotel on the 13th Oct. preceding. He also either knew, or ought to have known, as the fact was, that there was no written agreement whatever for the tenancy. Now, when it is stated the property is let at so much, and the relation of landlord and tenant really subsists, the rent reserved is some evidence, at least fair evidence, of what the annual value of the property is, but where it has only been occupied for a short time by a son-in-law of the owner, and the owner himself is living in the house, the nature of the relationship is such that no guide as to the annual letting value can be derived from the rent, which is stated to be reserved. I think, therefore, that it was the duty of Mr. Allen pointedly to call the attention of the valuers, if he meant to rely on this valuation, to this circumstance, and to ascertain what the real annual value of the property was, and that it is not enough for him to say that the proposed mortgagees are trustees, and assume that the valuer on that will give him a correct valuation which will enable him to act without exercising any judgment in the matter. But it does not stop there, because, so far from directing him to inquire into the annual letting value of the property, he gave instructions simply to check the correctness of the rentals, and therefore the indication, so far as it is given by these instructions to the valuers is simply this: check the accuracy of the statements in the particulars, that is to say, find out whether the hotel is really let for £200. a year. Under these circumstances I do not think that is enough. Then as to the valuation. It seems to me, on the face of it, that, having regard to the fact that Mr. Allen was a trustee-solicitor, and knew, as the evidence shows, perfectly well the rule of the Court, it was not a valuation which ought to have been acted on by him without further inquiry. He says that the valuer whom he employs is telling him that a trustee may safely lend to the extent of three-fourths of the value which he puts on the property, the rule of court, of which he was perfectly aware, being that *prima facie* on the best real estate security you are only to go to the extent of two-thirds, this being not property of that class, but, in the first place, house property, and, in the second place, property deriving part of its value from the circumstance of its being occupied for business. I do not wish to pass over some minor

matters, which are these, that in the valuation the chief rent was inaccurately stated to a small extent, and that it does not contain the particulars of the tenancies, as it was required to do; but I think on that footing further inquiry ought to have been made by Mr. Allen if he was really desirous to act as a prudent man, and as a trustee ought to have done. So far as appears, the only further inquiry which is made is the conversation with the surveyors as to their omission to state whether they had checked the rentals. Under these circumstances, I think, that this valuation was one which cannot be relied on by him. Then the onus is on him of showing that he acted as a prudent man in lending this money, and that the value of the property in 1878 was such as to justify an advance of £2,500. When one goes into the evidence it does not seem to me that he in the least fulfils the burden which is thrown upon him. [His Lordship then referred to the evidence and continued:] Therefore, it seems to me that, on the whole, Mr. Allen fails as regards this security, and I must hold it was an improper investment in the first instance. [His Lordship then stated the facts as to the mortgage for £2,400. on the property at Goole and said as to the instructions of the 30th March, 1878:] I must make this remark, not that I intend to decide the case on it; but I repeat what I said in the course of the argument, that to introduce the valuer to the mortgagor, or to the mortgagor's agent, as presumably Mr. Gardiner was, for the purpose of negotiating the amount of the fee, seems to me to be an inadvisable course on behalf of trustees or persons in the position of Mr. Allen. In the case which came before me last year, and which was referred to in the argument (*Smith v. Stoneham*), it was discovered that advantage had been taken of that circumstance to induce the valuer by the promise of a further fee from the mortgagor to make a favorable valuation. I do not say that anything of the kind occurred here. I have no ground for saying so. I merely make the remark in passing, that the course pursued here was an unfortunate one, and does sometimes give rise to unfortunate circumstances. But, as I said before, I do not decide the case in any way on that ground. Then as to the particulars, this remark occurs: It is clearly the duty of a trustee, or anybody acting on his behalf, who proposes to lend money on a security, to ascertain that the particulars which are given to him with reference to that security are correct. It cannot be right for a trustee to assume without investigation that the statements made to him by the proposed borrower are correct. The representation which is made with reference to this property is, that it is a freehold property let at weekly rents. From that at once it is to be inferred, and without any inquiry, and, of course, if it could not be inferred it is the duty of the trustee to ascertain, that the landlord pays all the rates and taxes. The rates and taxes and other outgoings are represented to be of the amount of £21. a year. It was the duty of the trustee to ascertain first of all that these were the weekly rents, and that all the property was let; and secondly, what the amount of the

rates and other outgoings would be. There is no evidence before me that, except by means of the letter which is addressed to Messrs. Fox, the valuers chosen by Mr. Allen, Mr. Allen did in any way ascertain or endeavor to ascertain whether the particulars thus given to him were correct, and there is no indication in this letter, as there was in the letter to Messrs. Bridgen in the former case, even to check the correctness of the rentals, or to insert the particulars of the tenancies. There is still less any direction to ascertain whether the statement as to the amount of rates and outgoings was correct. Now, in point of fact, it turns out that at the time, out of the twenty-one houses said to be let at weekly rents, four were unlet. It turns out that in point of fact the sum payable for rates and outgoings was very much larger than stated. It appears that in Goole the rates are very high, they amount to 6s. in the pound, and the statement which is made in evidence in reference to them is, that on this property alone the amount of rates would come to very nearly £60. Then, of course, if the security had to be enforced, the trustees could not themselves collect weekly rents, the one residing in London and the other residing in Manchester, and it would have been necessary that a collector should be employed. That would be another deduction from the amount. And then there was the ordinary average amount of repairs to be considered. Now, there is no evidence that in this respect Mr. Allen made any inquiry or gave any direction whatever, except the letter to Messrs. Fox, the valuers. Mr. Fox has made an affidavit, and he states what he did in the matter, and he says that he found four of the houses were unlet, that is to say, a fifth part of the property, and that he made inquiries of certain of the tenants of the houses as to the rents which were then paid, and that the result of the inquiries was his finding that, after deducting the rates and taxes from the gross rentals, the net annual value of the property was £217. That is obviously insufficient. He only inquired of some of the tenants. He did not report, as he ought to have done, that the property was new. But that was a matter which a trustee ought to have ascertained, and there was no inquiry made at all, so far as appears, as to the amount of the rates and taxes, which turned out to be very different from what they were represented to be. [His Lordship then referred to the alteration in Messrs. Fox's report of the 10th April 1878 and continued:] In the first instance, the valuation which was given by Messrs. Fox went quite up to the limit to which, according to the rule I have already referred to, and of which Mr. Allen was perfectly aware, a prudent trustee would *prima facie* lend. It is now increased to £2,400., going considerably beyond that limit; and if Mr. Allen is to rely upon that valuation so altered, it is surely incumbent on him to show that there were circumstances in the case which justified his lending that additional sum on the property. He has given no evidence as to the inquiries he made beyond this letter, which is in evidence, which passed between him and Mrs. Partington. It seems

to me again there that he has fallen short of the duty which a trustee undertakes when he lends on property of this kind, and that again the valuation he obtained is not sufficient under the circumstances to justify what he did. Then, we have to consider whether, notwithstanding that the valuation is not satisfactory, the property is one on which a prudent man would have lent. It seems to me again, the burden being on him, he falls far short of justifying it, and that, in fact, the evidence is the other way. [His Lordship referred to the evidence, and continued:] Upon the whole, I have come to the conclusion that this again was an improper investment. [His Lordship then dealt with the mortgage for £1,500., coming to the conclusion that that also was an improper investment. He continued:] I hold, therefore, as regards all the three mortgages, they were improper investments made from time to time by Mr. Allen, and that he is at all events liable. But there still remains the question to consider whether Mrs. Partington, who did not take so active a part in the transaction is, as between her and the *cestuis que trust*, also liable. It was contended in the first place on her behalf that she was not; and the trustees' indemnity clause, which goes somewhat beyond the usual form, was relied upon. That clause runs in this way: "I declare that my trustees shall not be answerable for each other's acts or receipts, nor for any bank or banker to whom any trust property may be intrusted for the purpose of, or until an investment, or any other loss whatever happening without their own respective wilful default, but shall be responsible for so much money only as shall come to their own respective hands," and so forth. It does not seem to me that that meets this case. What is complained of is that the money subject to the trust was invested in an improper security. That money was standing to the joint account of Mrs. Partington and Mr. Allen. The check was drawn upon that account, and signed by Mrs. Partington as well as by Mr. Allen, and the money was handed over, as I assume, to the mortgagor. That was her act just as much as it was Mr. Allen's, and, if the investment was an improper one, it does not seem to me that she can, on the ground of this indemnity clause, be exonerated from it. But then it was said that she, under the terms of the will, was employing Allen as her solicitor, that she was entitled to employ a solicitor within the proper scope of his business, and that she did employ him to do matters which were within the scope of that business, and that she acted on his advice, and, consequently, if he made a mistake, or was guilty of any negligence, the loss must fall on the trust estate, and not on her. Now the answer which was given, as I understood, in the first instance, to that argument was this—that it does not in the least matter that Mrs. Partington employed Mr. Allen as her solicitor; that, even if she had employed an independent solicitor, and he had been guilty of negligence, still she was answerable for his acts. I am not prepared to decide this case on that broad view. There are certainly a number of cases from

which I do not desire to dissent in any way in which it has been held that the advice of a solicitor, or the opinion of counsel, does not indemnify trustees. If a trustee is distributing a fund, and any difficulty arises as to the persons who may be entitled, he can have recourse to the court, and he would be completely indemnified by the order of the court. If under those circumstances he chooses to rely on the advice of a solicitor or the opinion of counsel, he gets no indemnity, and he must take the consequences of so doing. The same remarks apply to many other acts of trustees, and the facilities which are now given by the present practice to trustees for coming and obtaining the opinion of the court as to matters in the administration of the trust are so great, that in that class of cases the rule to which I have referred is not in the least likely to be relaxed. But, leaving all those cases in full and perfect force and entirely undisturbed, there remain a large class of cases in which the opinion of the court cannot be got, and yet in which it is necessary to have the advice of a solicitor. The present case is an illustration. Here trustees are about to invest on mortgage security. They must employ a solicitor to investigate the state of the title, and it cannot be that at every stage they are to come to the court and ask the court to say whether the solicitor is doing what is right. Yet it has been held, in cases of which *Hopgood v. Parkin*, 22 L. T. Rep. N. S. 772; L. Rep. 11 Eq. 74, is one, that a trustee employing a solicitor as to whose competence no objection could be raised, and who yet is guilty of some negligence, is liable to make good a loss of the trust fund arising from the solicitor having failed to take proper precautions. Lord Romilly in that case says: "It is material to consider the course pursued by the solicitor of the trustee. It is true that his conduct is not theirs; but he is appointed by them, he is their agent for the management of the affairs of the trust, and if he misconducts himself, through ignorance or negligence, or wilfully, he is answerable to the trustees, and they cannot, in my opinion, throw any of the loss thereby occasioned on the cestuis que trust."

That case of *Hopgood v. Parkin* was cited in the case of *Speight v. Gaunt*. Sir George Jessel does not, so far as I observe, comment on it directly, but he does observe that there are cases which have been decided against trustees which would be now repudiated. I do not know whether *Hopgood v. Parkin* was one of those which he had in view; but Lindley, L. J., expressly deals with *Hopgood v. Parkin*, and he says in respect to it: "That case certainly goes much further than I should have thought right; but in the result the case was appealed—an infant was concerned, and the Court of Appeal sanctioned a compromise in behalf of the infant." Then he adds this: "I wish most emphatically to say, if trustees are justified by the ordinary course of business in employing agents, and they do employ agents of good repute, and whose fitness they have no reason to doubt, and employ those agents to do that which is in the ordinary course of their busi-

ness, I protest against the notion that the trustees guarantee the honesty or solvency of the agents employed." That is laid down with respect to the employment of a broker, and I must say, speaking for myself, that I do not see why a similar observation should not apply to the case of a trustee employing a solicitor in good repute whose fitness he has no reason to doubt, and where the employment is only to do that which is in the ordinary course of business. I do not see why in a case of that sort a trustee should be held to guarantee the solvency or competency of his solicitor any more than he guarantees the solvency or honesty of his broker, and, if ever the case arises in which that has to be decided, I shall, if it come before me, consider long before I follow *Hopgood v. Parkin*. But, in my opinion, in the present case that question does not arise. In the first place, Mrs. Partington was tenant for life, and she was interested to a certain extent in getting a good income; and it is possible—I say no more—that that may have influenced her mind, perhaps unconsciously, and rendered her less cautious than she would otherwise have been. And, secondly,—and I here desire to express myself with the greatest caution, because there is still an important question remaining to be decided between her and Mr. Allen—I think, giving her the full benefit of everything which may be said for her, and having regard to the correspondence which took place, I should, if I held she was free from liability in this case, be allowing her to do that which the authorities say a trustee is not at liberty to do, namely, delegate the responsibility which he himself must assume. She could not delegate that responsibility to Mr. Allen in his capacity of co-trustee, because the cestuis que trust are entitled to the benefit of the independent judgment of every trustee. She could not properly in this case delegate it to him if she employed him as solicitor, because she was bound, according to what was laid down in *Speight v. Gaunt* and *Whiteley v. Learoyd*, not to delegate her duty as trustee to the solicitor, but simply to take his advice, and then consult and act on it as a prudent trustee would do. In this case, without going into the evidence, for the reasons I have mentioned, I think Mrs. Partington failed in that respect, if she relied on Mr. Allen; and, if I were to hold her free from responsibility in the matter, I should be allowing her to delegate to him the responsibility she was bound to take upon herself. I therefore hold, without prejudice to any question between her and Mr. Allen, that, as between her and the cestuis que trust, she is responsible for the investments made, jointly and severally, with Mr. Allen.

CHAPTER VI.

CONSTRUCTIVE TRUSTS AND EQUITABLE LIENS—TRACING PROPERTY WRONGFULLY APPROPRIATED INTO ITS SUBSTITUTE.

FERRARS v. CHERRY et al.

(In Chancery, 1700. 2 Vernon, 383.)

The defendant purchased from the plaintiff's father and mother the lands in question by deed and fine, whereby they conveyed to him and his heirs; whereas pursuant to an agreement made on their marriage, the estate was settled to the plaintiff's father for life, part to the mother for her jointure, remainder of the whole to the first and other sons in tail male, etc. And it appeared by the proofs in the case, that the defendant Cherry had notice of the settlement, and that the same amongst the other writings was delivered to him. Upon his purchase, the defendant took in a mortgage term, which was prior to the settlement, and enters, and afterwards sold the estate, part to Howland, and other part to Harwood, who were made defendants to the bill, and pleaded they were purchasers without notice; and the plaintiff not being able to prove any notice upon them, the bill as against them was dismissed; but as against the defendant Cherry, the court decreed him to account for the consideration money for which he sold the estate, with interest, from the decease of the plaintiff's father and mother, thereout discounting what was due on the mortgage made prior to the settlement. * * *¹

LOWTHER v. CARLTON.

(In Chancery, before Lord Chancellor Hardwicke, 1741. 2 Atkins, 242.)

LORD CHANCELLOR.² This is a bill brought to impeach a purchase made thirty-two years ago: the defendant was a purchaser with notice from the Marquis of Wharton, who bought without notice.

It is certainly the rule of this court, that a man who is a purchaser with notice himself from a person who bought without notice, may shelter himself under the first purchaser, or otherwise it would very much clog the sale of estates. * * *

¹ A part of the case is omitted.² Only part of the case is given.

BOVEY v. SMITH.

(In Chancery, before Lord Chancellor Nottingham, 1682. 1 Vernon, 60.)

A trustee having sold the land to a stranger, that had no notice of the trust, and a fine with proclamations and five years past, the trustee afterwards, for valuable consideration really paid, purchases these lands again of the vendee. And it was decreed by the Lord Chancellor, with the concurring opinion of the Lord Chief Justice North, that the trustee, notwithstanding the fine, proclamations, and non-claim for five years, should stand seized in trust as at first, as if the land had never been sold, nor any fine levied.

BRAINARD SHALER and Others v. MARY E. TROWBRIDGE and Others.

(Court of Errors and Appeals of New Jersey, 1877. 28 N. J. Eq. 595.)

VAN SYCKEL, J.³ In January, 1865, Joseph A. Trowbridge, Brainard Shaler, John Kiersted and Wynkoop Kiersted entered into partnership in the leather business, which was terminated by the death of Trowbridge December 14th, 1869. During its continuance Trowbridge had charge of the books and finances. The contested question on this appeal is, whether certain real estate and certain policies of life insurance, to which Mary E. Trowbridge held the legal title at her husband's death, should be decreed to be in equity the property of the firm. The evidence shows that Trowbridge alone drew the firm's checks, and exclusively managed its money affairs, and that the yearly balance-sheets, made up and presented by him to the firm, were false and fraudulent. Checks of the firm to the amount of \$103,155.97 were drawn by him to his own individual use, and paid at the bank, none of which were either included in his yearly balance-sheets, or charged to him on the books of the firm. At the same time the amount drawn by him during the existence of the partnership, and actually charged to his accounts, exceeded what he would have been entitled to, by the articles of co-partnership, by more than \$15,000; so that, upon an adjustment of the partnership concerns, he will be indebted to the firm in more than \$118,000.

Out of the moneys drawn upon the uncharged checks, or by the checks themselves in some instances, Trowbridge paid for the real estate and the policies of insurance now in controversy. The policies were issued, in the first place, in favor of Trowbridge himself, and the half-yearly premiums paid by the uncharged checks of the firm to the insurance company's agent. In April, 1868, they were changed,

³ The opinion of the master is omitted.

by Trowbridge's request, so as to be payable to his wife, who, after her husband's death, received the several amounts due upon the policies from the insurance companies. Upon this statement of facts, which the case satisfactorily establishes, shall the real estate and the proceeds of the policies, be declared to be held in trust by the wife as the property of the firm?

This is not a case of resulting trust, where the trust results, or is implied, from the contracts and relations of the parties. It arises, *ex maleficio*, out of the active fraud and dishonest conduct of the partner Trowbridge and may be termed a constructive trust, which equity will fasten on the conscience of the offending party, and convert him into a trustee of the legal title, and order him to hold and execute it in such manner as to protect the rights of the defrauded party, and promote the interests and safety of society. It differs from other trusts in that it is not within the intention or contemplation of the parties at the time the contract is made upon which it is construed by the court, but it is thrust upon a party contrary to his intention and against his will. 1 Perry on Trusts, § 166.

If a person, occupying a fiduciary capacity, purchases property with fiduciary funds in his hands, and takes the title in his own name, he will, by construction, be charged as a trustee for the person entitled to the beneficial interest in the fund with which such purchase was made. This rule applies to a partner who fraudulently purchases for himself with the partnership funds, and it extends to personal as well as real estate; in every case the equitable ownership rests in the person from whom the consideration moves. *Johnson v. Dougherty*, 18 N. J. Eq. 406; *Cutler v. Tuttle*, 19 N. J. Eq. 558; *Dyer v. Dyer*, 1 Lead. Cas. in Eq. 203; 1 Perry on Trusts, §§ 127-130.

In *Taylor v. Plumer*, 3 M. & S. 575, Lord Ellenborough said that if A is trusted by B with money to purchase a horse for him, and he purchases a carriage with that money, B is entitled to the carriage. That it made no difference, in reason or in law, into what other form, different from the original, the change may have been made, for the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right ceases only when the means of ascertainment fail. This is declared to be the settled rule, in *Story's Eq. Juris*. §§ 1258, 1259.

So completely are the two things identified, even at law, where the conversion can be clearly traced, that in equity a distinction can never be drawn, between the money misappropriated and the results of its investment, in favor of the fraud-doer.

Nor does it make any difference that the investment turns out to be a profitable one, for, whatever the profit may be, it must belong to the *cestui que trust*. It is a constructive fraud upon the latter to use his property unlawfully and to retain the profit of the misapplication, it being a fundamental principle in regard to a trustee that he shall derive no gain to himself from the employment of the trust fund.

2 Story's Eq. Juris. § 1261; McKnight's Ex'rs v. Walsh, 24 N. J. Eq. 509.

Much more does public policy require that one who has corruptly thrust himself into the position of a trustee, shall not profit by his fraud. The fact that this property has been passed into the hands of the wife does not prevent the application of the equitable principles. She received it as a gift from her husband; without paying any consideration whatever for it. When once a fraud has been committed, not only is the person who committed the fraud precluded from deriving any benefit from it, but every innocent person is so, likewise, unless he has, in good faith, acquired a subsequent interest for value; for a third person, by seeking to derive any benefit under such a transaction, or to retain any benefit resulting therefrom, becomes *particeps criminis*, however innocent of the fraud in the beginning. 1 Perry on Trusts, § 172, and cases cited.

It is urged that a life policy should be exempt from the equitable rule which applies to other transactions, because it differs in its character from ordinary investments, and is a beneficial provision for the family, which should be favored.

Public policy clearly forbids the adoption of this suggestion; it would invite the commission of the wrong by assuring the wrongdoer that there is one mode in which he could surely profit by his turpitude, in securing a provision for his family. The policy is the thing which the partnership money purchased, and it stands in the place of what was corruptly abstracted. Whether the policy would be productive, when terminated by death, of more or less than the premiums paid upon it, would depend upon the length of the life insured. The fact that it has a contingent value does not distinguish it, in principle, from an investment in the purchase of stock, or of an annuity, and can give no support to the claim of the widow, that nothing should be exacted of her beyond the amount of premiums paid upon it out of the firm funds. If this suit had been prosecuted in the lifetime of the husband, and the policy had been disposed of to the company for its surrender value, it would hardly have been insisted that he could claim, in a court of conscience, a right to any excess of the proceeds after refunding to his firm the amount of the premiums. All the premiums were paid with the partnership funds—nothing was paid by the wife. The transfer to her, therefore, cannot change the equities, nor divest the trust.

The inflexible rule, in equity, will be equally violated, whether she takes the value of the policies in excess of the premiums paid, or the appreciation in the real estate.

Trowbridge contributed nothing, in money or otherwise, to the purchase or support of the policies. The entire sum derived from them is the product of the partnership money. He did no act upon which he could have based the slightest claim in equity to be benefited by the transaction. It would be idle to denounce his turpitude, and, at

the same time, to reward it by allowing him to transmit its fruits to his family. His wife can derive, through so corrupt a source, no equitable rights to these policies; neither public policy, nor the intrinsic justice of the case, would be promoted by allowing her to do so.

In my opinion, the decree below should be affirmed, and the case remitted, that it may be proceeded in accordingly.⁴

Decree unanimously affirmed.

RICHARD G. WATSON v. ROBERT THOMPSON, Administrator, et al.

(Supreme Court of Rhode Island, 1879. 12 R. I. 466.)

Bill in equity to establish a title to realty. The facts are stated in the opinion of the court.

DURFEE, C. J.⁵ This is a suit in equity by Richard G. Watson, a son and one of the heirs at law of Elisha Watson, Jr., late of South Kingston, deceased, against said Elisha's widow and the other heirs, and against the administrator of his estate. The bill sets forth that Susan Watson, a former wife of Elisha, died May 7, 1834, intestate, and the owner of an undivided moiety of the Burke Farm, so called, in South Kingston. She left her husband and two children by him, to wit, the complainant and Henry C. Watson, then infants, surviving her. Elisha Watson, Jr., was subsequently appointed guardian of the two children, and as such was authorized by the General Assembly, at its January session in 1842, to sell all their right, title, and interest in the Burke Farm, under the advice and direction of the Court of Probate of South Kingston, first giving bond with surety, to make the sale according to the direction of said court, and to invest the proceeds in other real estate or productive property for the benefit of the children after his decease, he being entitled, as tenant by the curtesy, to the use and income of the property during his life. Elisha Watson, Jr., accordingly sold the Burke Farm under the direction of the court, first giving bond as directed. He received \$2,000 for the half in which his children were interested. Subsequently, in 1843, he purchased a farm, called the Bentley Farm, at or near Narragansett Pier, in South Kingston, containing about one hundred and eighty-three acres, for which he paid the sum of \$8,250. The bill alleges that the \$2,000, proceeds of the sale of one-half of the Burke Farm, were used in making up said sum of \$8,250, and were invested by Elisha Watson, Jr., in the Bentley Farm for the benefit of his children

⁴ *Lehman v. Gunn*, 124 Ala. 213, 27 South. 475, 51 L. R. A. 112, 82 Am. St. Rep. 159 (1899); *Holmes v. Gilman*, 138 N. Y. 369, 34 N. E. 205, 20 L. R. A. 566, 34 Am. St. Rep. 463 (1893); *Dayton v. Clafin Co.*, 19 App. Div. 120, 45 N. Y. Supp. 1005 (1897); *Bromley v. Cleveland*, Cincinnati, Chicago & St. Louis Ry. Co. and Others, 103 Wis. 562, 79 N. W. 741 (1899).

⁵ A part of the opinion is omitted.

after his decease. We think the evidence shows that the \$2,000. were used in the purchase of the Bentley Farm. After 1843, Elisha Watson, Jr., sold and conveyed to different persons many different parcels of the Bentley Farm, until, at the time of his decease, he had reduced the Farm to between fifty and sixty acres, a part of which he had mortgaged. He died May 31, 1877, deeply insolvent. Henry C. Watson had died before him, December 9, 1863, being childless and unmarried. The bill alleges and claims that the complainant succeeded to the interest of Henry C. Watson in the Bentley Farm as his sole heir at law. The bill also alleges and claims that the part of the Bentley Farm remaining unsold was reserved by Elisha Watson, Jr., for the complainant as his equitable part thereof. The prayer is, that a decree may be entered vesting the title of the remaining part, or of so much thereof as he is equitably entitled to, in the complainant.

[After holding that the complainant was not the heir at law of Henry C. Watson the Chief Justice continued:]

2. The second question is, Is the complainant entitled to any, and if any, to what relief? The defendant contends that the complainant is not entitled to relief, because Elisha Watson, Jr., did not invest the \$2,000. which he received from the sale of the Burke Farm in the purchase of the Bentley Farm, for the benefit of the complainant and his brother, but solely for his own benefit, having borrowed it for that purpose, and that subsequently, after the complainant came of age, he settled with him for it, fully repaying him. In support of this view, a good deal of evidence was submitted; but we are not satisfied that the money was ever repaid. Elisha Watson, Jr., was entitled to the use or income of it during his life, and therefore no inference of payment can be drawn from mere lapse of time. And as to the point that he borrowed the money, the answer is, that he could not borrow it from anybody but himself, his wards having no capacity to lend it; and it is settled that if a guardian uses the money of his ward in the purchase of real estate, a trust will result to the ward, and the ward has his election either to have the estate conveyed to him, or to have the money repaid with interest. *Perry on Trusts*, §§ 127, 128.

It is contended that no trust resulted in favor of the complainant, because the Bentley Farm was paid for in part only out of the proceeds of the Burke Farm. We do not think this position is tenable. On the contrary, it is now well settled, that if land is conveyed to a person who pays for it partly out of his own funds and partly out of funds which he holds in trust for another, a trust will result to the other in proportion to his interest in the funds employed. *Botsford v. Burr*, 2 John. Ch. (N. Y.) 405; *Pinney v. Fellows*, 15 Vt. 525; *Buck v. Swazey*, 35 Me. 41, 56 Am. Dec. 681; *Perry on Trusts*, § 132. The rule goes even farther, and holds that if a trustee purchase an estate with trust funds, adding funds of his own, a trust will result to the cestui que trust, and the burden will be on the trustee to show the amount of his own funds, or otherwise the cestui que trust will take

the whole. *Russell v. Jackson*, 10 Hare, 204, 214; *McLarren v. Brewer*, 51 Me. 402; *Seaman v. Cook*, 14 Ill. 501, 505.

The price paid for the Bentley Farm was \$8,250. Of this \$1,000, being four thirty-thirds of the whole sum, belonged to the complainant, subject to a life interest in Elisha Watson, Jr. It follows that the equitable fee of an undivided four thirty-thirds of the Bentley Farm resulted to the complainant, subject to a life estate in Elisha Watson, Jr., the moment the farm was conveyed to Elisha Watson, Jr. If Elisha Watson, Jr., had kept the farm entire until his decease, then the complainant, unless his claim were in some way impaired, would have been entitled to a conveyance of an undivided four thirty-thirds of the farm.

We have seen that Elisha Watson, Jr., did not preserve the farm entire, but sold and conveyed away the larger portion of it. What effect had this on the equitable interest of the complainant? We think it is perfectly clear that every time Elisha Watson, Jr., sold and conveyed away any part or parcel of the Bentley Farm, he sold and conveyed away the complainant's equitable interest in that part or parcel, provided the grantee was a purchaser for value and without notice, and that after every such sale and conveyance there remained for the complainant in the farm only his resulting trust in an undivided four thirty-thirds of what was left. The complainant seems to suppose that, having lost his resulting interest in what was sold, he can have the loss made good to him by a proportional increase of interest in what is left. But this surely cannot be so. His interest was inherent in every part. As soon as any part was sold his interest in that part was converted into an interest in the price received for it. It remained a resulting trust or equity in the price, or in the property in which the price was invested, so long as it could be traced specifically; and when it ceased to be specifically traceable, it became simply a personal debt or demand to be recovered of Elisha Watson, Jr., or out of his estate, like any other personal debt or demand. *Thompson's Appeal*, 22 Pa. 16. * * *

We decide that the complainant is entitled to have four undivided thirty-thirds of the part of the Bentley Farm remaining unsold and not under mortgages, free and clear of all claims of the widow, heirs, or creditors of Elisha Watson, Jr. We also decide that he is entitled in like manner to four thirty-thirds of the mortgaged part, subject to the mortgage, the other twenty-nine thirty-thirds, however, being primarily chargeable with the mortgage debt.

The decree may be drawn to carry the decision into effect. ⁶

Decree accordingly.

⁶ *Docker v. Simes*, 2 Myl. & K. 655 (1834); *In re Mulligan*, 116 Fed. 715, 717 (1902); *Kyle v. Barnett*, 17 Ala. 306 (1850); *Tilford v. Torrey*, 53 Ala. 130 (1875); *Kelly v. Browning*, 113 Ala. 420, 21 South. 928 (1896); *Howison v. Baird*, 145 Ala. 683, 40 South. 94 (1905); *Byrne v. McGrath*, 130 Cal. 316, 62 Pac. 559, 80 Am. St. Rep. 127 (1900); *Bazemore v. Davis*, 55 Ga. 504 (1875); *Harris v. McIntyre*, 118 Ill. 275, 8 N. E. 182 (1886); *Reynolds v. Sumner*,

MRS. A. E. FANT et al. v. JAS. DUNBAR, Administrator, et al.

(Supreme Court of Mississippi, 1893. 71 Miss. 576, 15 South. 30.)

From the Chancery Court of Noxubee County.

In 1871, S. P. Fant died intestate, leaving as his heirs his widow and three minor children, Ida, Iley and S. P. Fant. With the exception of an insurance policy of \$5,000 in favor of his heirs, he left no estate. Soon after his death, Dr. J. C. Fant qualified as guardian of said minors, and collected their interest in the insurance policy, amounting to \$3,660.29, which sum he reported to the court in his inventory and accounts. Without obtaining an order of court therefor, he immediately loaned the entire amount to a mercantile firm, taking their note for \$4,026.27, due December 23, 1872, which amount included interest to maturity. He reported the loan to the court, which declined to approve it, and the amount, with interest thereon, was carried forward in the accounts of the guardian as being money in his hands, and, in his accounts, he was allowed credit for the interest, which, as the only income of the wards, he had expended for their support. Meantime, in 1873, the firm to which the guardian had loaned the money of said wards, being unable to repay the loan, executed to Dr. Fant, in his own name, a deed to a store-house and lot in Macon, Miss., reciting as the consideration the sum of \$4,099.48, being the amount of principal and interest due at that time. The deed was executed and delivered with the understanding that it was to stand as a mortgage until January, 1874, when, if the debt was not sooner paid, it was to be absolute, and in full payment of the loan and interest. The debt was not paid, and Dr. Fant took possession of the store-house, and continued in possession until his death in 1889, and, during this time, he paid the taxes, insurance and repairs, and collected the rents. At his death, his widow took possession, and has continued in possession ever since.

The guardianship was never settled, and the amount due by Dr. Fant, as guardian, to his said wards, was not paid, and, in March, 1890, Iley W. Fant filed his bill against the heirs of his said guardian, reciting the circumstances of the purchase of the lot as above nar-

126 Ill. 58, 18 N. E. 334, 1 L. R. A. 327, 9 Am. St. Rep. 523 (1888); Fausler v. Jones, 7 Ind. 277 (1855); Bitzer v. Bobo, 39 Minn. 18, 38 N. W. 609 (1888); White v. Drew, 42 Mo. 561 (1868); Bowen v. McKean, 82 Mo. 594 (1884); Shaw v. Shaw, 86 Mo. 594 (1885); Jones v. Elkins, 143 Mo. 647, 45 S. W. 261 (1898); Crawford v. Jones, 163 Mo. 577, 63 S. W. 838 (1901); McLeod v. Venable, 163 Mo. 536, 63 S. W. 847 (1901); Johnston v. Johnston, 173 Mo. 91, 120, 73 S. W. 202, 61 L. R. A. 166, 96 Am. St. Rep. 486 (1902); Crowley v. Crowley, 72 N. H. 241, 56 Atl. 190 (1903); Dayton v. Clafin Co., 19 App. Div. 120, 45 N. Y. Supp. 1005 (1897); Collins v. Corson (N. J. Ch.) 30 Atl. 862 (1894); Mayer v. Kane, 69 N. J. Eq. 733, 61 Atl. 374 (1905); Lyon v. Akin, 78 N. C. 258 (1878); Wallace v. Duffield, 2 Serg. & R. (Pa.) 521, 7 Am. Dec. 660 (1816); Rupp's Appeal, 100 Pa. 531 (1882); Lloyd v. Woods, 176 Pa. 63, 34 Atl. 926 (1896); Greene v. Haskell, 5 R. I. 447 (1858); Moffatt v. Shepard, 2 Pin. (Wis.) 66, 52 Am. Dec. 141 (1847).

rated, and praying that a resulting trust be established in his favor to the extent of a third interest therein. This bill was answered by the defendants, and, apart from the defence noticed in the opinion, many other matters of controversy were introduced into the suit, mostly relating to the course of the guardianship and the rights of the parties growing out of the collection by the guardian of the rents and profits of the lot and his expenditures for taxes, insurance and repairs. In view of the opinion which is confined to the consideration of a single point, it is not necessary to state the parts touching these matters.

Pending the suit, complainant, Iley W. Fant, died, and the cause was revived in the name of James Dunbar, administrator. Before a final disposition thereof, S. P. Fant, another of the wards, having come of age, also filed a bill, setting up substantially the same facts in regard to the guardianship and the purchase of the store-house and lot, but, instead of asking that a trust be declared in his favor as to a one-third interest in the house and lot, he claimed the right of electing whether to take a proportionate interest therein, or to claim an accounting for his money so expended and interest, as constituting a charge on the property.

These two causes were by consent consolidated. The court below rendered a decree finding the facts as to the guardianship and purchase of the property as above stated, and decreeing that the complainants, Iley W. Fant and S. P. Fant, by virtue of the unauthorized loan of their funds, and the purchase by their guardian in his own name of the house and lot in payment of the principal and interest of the loan, became entitled each to a third interest in the house and lot, and a like interest in the rents collected therefrom. On the other hand, the decree allowed, as against the rents, all proper sums expended by the guardian for taxes, insurance and repairs on the property.

The decree also adjusted other matters of controversy between the parties, but the only portion thereof specially noticed by this court is that which gave complainants each a third interest in the house and lot, notwithstanding the consideration of the conveyance thereof to Dr. Fant exceeded by about \$700 the principal of the amount belonging to the wards, which had been loaned to the owners of the property. Although such excess represented interest on the loan, it will be borne in mind that the guardian in his accounts had been allowed for expenditures in behalf of the wards as against this interest, which represented their income. The defendants have appealed.

COOPER, J., delivered the opinion of the court.

On the evidence it is entirely settled what part of the purchase price of the lot described in the pleading and evidence was the money of his wards, and what part was the money of Dr. Fant, the guardian. Under these circumstances, his wards had the right, at their election, to charge their money, with interest, upon the lot, or to take an interest therein proportionate to the amount of their money that went into it

as compared to the purchase price. They have not the right to elect to take the entire interest in the property, for that would be to appropriate not their own but the property of the guardian. Before making their election, the wards are entitled to have accounts stated in both aspects, and, being thus advised, to elect that which is the more beneficial to them.⁷

Decree reversed and cause remanded.

JOHN C. BOHLE et al., Appellants, v. DIEDRICH HASSELBROCH, Respondent.

(Court of Errors and Appeals of New Jersey, 1902. 64 N. J. Eq. 334, 51 Atl. 508, 61 L. R. A. 323.)

On appeal from a decree advised by Vice Chancellor Stevens, whose opinion is reported in 61 N. J. Eq. 470, 48 Atl. 916.

DIXON, J. Anton L. Bohle, who died in 1863, leaving a widow and four children, by his will appointed his wife, Anna, his executrix and gave her all his property in trust for the maintenance of herself and his children during her life, and gave it after her death to his children. The will directed the trustee to keep the property invested "on good first bonds and mortgages of real estate." In August 1864, the widow married Diedrich Hasselbroch, by whom she afterwards had three children. In January, 1868, she purchased two plots of land in Hoboken, taking title thereto in her own name. The purchase price of these lots was \$14,700, but as they were encumbered for \$2,000, only \$12,700 was to be paid in cash. Of this sum more than one-half, but exactly how much cannot be ascertained, was paid with money which Mrs. Hasselbroch held in trust under Mr. Bohle's will. At that time Mr. Bohle's children were all minors, living with their mother and stepfather. In December, 1898, Mrs. Hasselbroch died, and by her will devised her Hoboken lots to the three surviving children of Mr. Bohle, who now own the interest of their deceased sister, and are in possession of the property. Mr. Hasselbroch having brought an action of ejectment against these children, claiming that he was entitled to the possession of the property as tenant by the curtesy of his wife's fee, they filed the present bill to restrain that suit, on the ground that in equity their mother was only tenant for life and they were owners of the fee, because of the improper use of the trust funds in the purchase. The Chancellor's decree denied this relief, but adjudged that the complainants were entitled to a lien on the property, prior to the husband's curtesy, for so much trust money as was shown to have been used in

⁷ A similar right of election between a trust in a proportionate share and an equitable lien for the money invested and interest was recognized in the following cases: *Bitzer v. Bobo*, 39 Minn. 18, 38 N. W. 309 (1888); *Crawford v. Jones*, 163 Mo. 577, 63 S. W. 838 (1901); *Greene v. Haskell*, 5 R. I. 447 (1858).

the purchase, viz., \$6,423, and interest since Mrs. Hasselbroch's death, less rents and profits. From this decree the complainants appeal.

It is clear that Mrs. Hasselbroch committed a breach of trust when she used the trust fund in buying real estate, and took the title to herself without providing any bond and mortgage as a first lien in favor of the trust estate, as directed by the will of her deceased husband; and the question is, what equitable situation was thereby created?

Several settled doctrines of courts of equity are pertinent to this inquiry.

It is a fundamental principle in regard to trust estates that the trustee shall derive to himself no gain, benefit or advantage by the use of the trust funds; whatever profit may be made shall belong to and become parcel of the trust estate. *McKnight's Executor v. Walsh*, 24 N. J. Eq. 498. An outgrowth of this principle is that, as between cestui que trust and trustee and all persons claiming under the trustee otherwise than by purchase for valuable consideration without notice, all property belonging to the trust, however much it may be changed or altered in its nature or character, continues to be subject to or affected by the trust. *Pennell v. Deffell*, 4 De G., M. & G. 372, 378. As a concomitant of the rule just stated, and to effectuate fully the fundamental principle, another rule exists, that, when the trustee has improperly changed the form of the estate, the cestuis que trust may elect whether they will accept the estate in its form or will hold the trustee responsible for it in its original condition. *Ferris v. Van Vechten*, 73 N. Y. 113. If the improper conversion turns out to be advantageous, they may adopt it and take the profit; if it results in loss, they may insist on having an equivalent for the estate as it was before the change; and when the cestuis que trust are infants, the court will deal with the matter as it shall consider best for their interests. *Holcomb v. Executor of Holcomb*, 11 N. J. Eq. 281. This right of election by the cestuis que trust is upheld by courts of equity in many cases where there has been misconduct on the part of the trustee, as may be seen by reference to *Fox v. Mackreth*, 1 Lead. Cas. Eq. 115, and has been fully approved by this court. *Mulford v. Bowen*, 9 N. J. Eq. 797; *Stewart v. Lehigh Valley Railroad Co.*, 38 N. J. Law, 505. It is enforced in cases like the present, for if a trustee purchases property with trust funds in his hands, and takes title in his own name and for his own benefit, he will, at the option of the cestuis que trust, be decreed to hold it in trust for them. *Durling v. Hammar*, 20 N. J. Eq. 220; *Story*, Eq. Jur. §§ 1260, 1262. And if, in such a purchase, he has mixed up moneys of his own with the trust funds, a trust will still result to the cestuis que trust at their option, and the burden will be on the trustee to show the amount of his own funds used in the purchase, and so far as he fails to make that distinction the court holds the property bound by the trust. *Russell v. Jackson*, 10 Hare, 204, 213; *In re Pumfrey*, L. R. 22 Ch. Div. 255; *Perry, Trusts*, § 128; 2 Pom. Eq. Jur. § 1076 (2).

In accordance with these doctrines we think that the complainants, when their right to the possession of the trust estate matured by the death of their mother, were entitled, upon showing that the trust funds had formed a considerable part of the purchase money by which their mother had acquired title to the Hoboken lots, to elect whether they would claim a lien upon the lots for the amount of the trust funds used in the purchase, or would claim the lots, subject to be charged, in favor of the personal representatives of their mother, with so much of the purchase money as consisted of her own funds, and that, in endeavoring to ascertain how much was trust money and how much was the trustee's own, every reasonable intendment should be made against the trustee through whose fault the trust had become obscure.

Since the complainants, being in possession of the lots, have filed their bill in equity to have it decreed that by their trustee's purchase they became owners of the fee in remainder after their mother's life estate, they have thereby elected to take the real estate in lieu of the trust money invested therein, and to hold it charged only with their mother's own money so invested. Such a charge gives the husband no right to maintain ejectment, and consequently the complainants are entitled to a decree restraining his suit.

The present proceedings are not adapted to the ascertainment either of the amount of the charge or of the persons entitled to enforce it.

Let the decree appealed from be reversed and a decree be entered as above indicated.

JAMES A. CAMPBELL, v. JOHN B. DRAKE et al.

(Supreme Court of North Carolina, 1844. 39 N. C. 94.)

Cause removed from the Court of Equity of Wake County, at the Fall Term, 1845.

The bill states that the plaintiff kept a retail shop in Raleigh, and that a lad, by the name of John Farrow, was his shopkeeper for several years; and that, while in his employment, Farrow abstracted, to a considerable amount, money and goods belonging to the plaintiff, and that with the money of the plaintiff, taken without his knowledge or consent, Farrow purchased a tract of land at the price of \$500. The bill states a great number of facts, tending to show that Farrow paid for the land with the effects of the plaintiff, which he dishonestly converted to that purpose. Farrow afterwards died under age, and the land descended to his brothers and sisters; and the plaintiff, having discovered his losses of money and merchandise, and that Farrow had purchased the land as aforesaid, filed this bill against his heirs, and therein insists, that he has a right to consider the purchase as made, and the land held, for the use of the plaintiff, and that Farrow should be declared a trustee for him.

The bill was answered, so as to put in issue the various charges of dishonesty by Farrow, and the fact that the land was paid for with money purloined from the plaintiff: and much evidence was read to those points.

RUFFIN, C. J. The Court, though naturally inclined to every presumption in favor of innocence, and especially of a young person, who seems to have been so well thought of while he lived, is satisfied from the proofs, that the plaintiff was much plundered by this youth; and we have no doubt, that every cent of the money with which he paid for the land, he had pilfered from his employer. Nevertheless, we believe the bill cannot be sustained. The object of it is to have the land itself, claiming it as if it had been purchased for the plaintiff by an agent expressly constituted; and it seems to us, thus stated, to be a bill of the first impression. We will not say, if the plaintiff had obtained judgment against the administrator for the money as a debt, that he might not come here to have the land declared liable, as a security, for the money laid out for it. But that is not the object of this suit. It is to get the land, which the plaintiff claims as his; and, upon the same principle, would claim it, if it were worth twenty times his money, which was laid out for it. Now, we know not any precedent of such a bill. It is not at all like the cases of dealings with trust funds by trustees, executors, guardians, factors, and the like; in which the owner of the fund may elect to take either the money or that in which it was invested. For, in all those cases, the legal title, if we may use the expression, of the fund, is in the party thus misapplying it. He has been entrusted with the whole possession of it, and that for the purpose of laying it out for the benefit of the equitable owner; and therefore all the benefit and the trustee ought, in the nature of his office, and from his relation to the cestui que trust, to account for to that person. But the case of a servant or a shopkeeper is very different. He is not charged with the duty of investing his employer's stock, but merely to buy and sell at the counter. The possession of the goods or money is not in him, but in his master; so entirely so, that he may be convicted of stealing them, in which both a cepit and asportavit are constituents. This person was in truth guilty of a felony in possessing himself of the plaintiff's effects, for the purpose of paying them out for his own lucre; and that fully rebuts the idea of converting him into a trustee. If that can be done, there would be, at once, an end to punishing thefts by shopmen. If, indeed, the plaintiff could actually trace the identical money taken from him, into the hands of a person who got it without paying value, no doubt he could recover it; for his title was not destroyed by the theft. But we do not see how a felon is to be turned into a trustee of property, merely by showing that he bought it with stolen money. If it were so, there would have been many a bill of the kind. But we believe, there never was one before; and, therefore, we cannot entertain this. But we think the facts so clearly established, and the demands of justice so strong

on the defendants to surrender the land to the plaintiff, or to return him the money that was laid out in it, that we dismiss the bill without costs.⁸

PER CURIAM. Decree accordingly.

ELIZABETH S. NEWTON v. OLIVER PORTER *et al.*

(Court of Appeals of New York, 1877. 69 N. Y. 133, 25 Am. Rep. 152.)

Appeal from judgment of the General Term of the Supreme Court, in the Third Judicial Department, affirming a judgment in favor of plaintiff, entered upon a decision of the court at Special Term.

The nature of the action and the facts are set forth sufficiently in the opinion.

ANDREWS, J.⁹ This is an equitable action brought to establish the right of the plaintiff to certain securities, the proceeds of stolen bonds, and to compel the defendants to account therefor.

In March, 1869, the plaintiff was the owner of \$13,000 of government bonds, and of a railroad bond for \$1,000, negotiable by delivery, which, on the 12th of March, 1869, were stolen from her, and soon afterwards \$11,500 of the bonds were sold by the thief and his confederates, and the proceeds divided between them. William Warner loaned a part of his share in separate loans and took the promissory notes of the borrower therefor. George Warner invested \$2,000 of his share in the purchase of a bond and mortgage, which was assigned to his wife Cordelia without consideration.

In January, 1870, William Warner, George Warner, Cordelia Warner, and one Lusk were arrested upon the charge of stealing the bonds, or as accessories to the larceny, and were severally indicted in the County of Cortland. The Warners employed the defendants, who are attorneys, to defend them in the criminal proceedings, and in any civil suits which might be instituted against them in respect to the bonds, and to secure them for their services and expenses, and for any liabilities they might incur in their behalf, William Warner transferred to the defendants Miner and Warren promissory notes taken on loans made by him out of the proceeds of the stolen bonds, amounting to \$2,250 or thereabouts, and Cordelia Warner, for the same purpose assigned to the defendant Porter the bond and mortgage above mentioned.

The learned judge at Special Term found that the defendants had notice at the time they received the transfer of the securities, that they were the avails and proceeds of the stolen bonds, and directed judg-

⁸ *Pascoag Bank v. Hunt*, 3 Edw. Ch. (N. Y.) 583 (1842); *Ensley v. Balentine*, 4 Humph. (Tenn.) 233 (1843); *Cunningham v. Wood*, 4 Humph. (Tenn.) 417 (1843); *Hawthorne v. Brown*, 3 Sneed (Tenn.) 462 (1856).

⁹ A part of the opinion is omitted.

ment against them for the value of the securities, it appearing on the trial that they had collected or disposed of them and received the proceeds.

The doctrine upon which the judgment in this case proceeded, viz., that the owner of negotiable securities stolen and afterwards sold by the thief may pursue the proceeds of the sale in the hands of the felonious taker or his assignee with notice, through whatever changes the proceeds may have gone, so long as the proceeds or the substitute therefor can be distinguished and identified, and have the proceeds or the property in which they were invested subjected, by the aid of a court of equity, to a lien and trust in his favor for the purpose of recompense and restitution, is founded upon the plainest principles of justice and morality, and is consistent with the rule in analogous cases acted upon in courts of law and equity. It is a general principle of the law of personal property that the title of the owner cannot be divested without his consent. The purchaser from a thief, however honest and bona fide the purchase may have been, cannot hold the stolen chattel against the true proprietor, but the latter may follow and reclaim it wherever or in whosoever hands it may be found. The right of pursuit and reclamation only ceases when its identity is lost and further pursuit is hopeless; but the law still protects the interest of the true owner by giving him an action as for the conversion of the chattel as against any one who has interfered with his dominion over it, although such interference may have been innocent in intention and under a claim of right, and in reliance upon the title of the felonious taker. The extent to which the common law goes to protect the title of the true owner has a striking illustration in those cases in which it is held that where a wilful trespasser converts a chattel into a different species, as for example, timber into shingles, wood into coal, or corn into whiskey, the product in its improved and changed condition belongs to the owner of the original material. *Silksbury v. McCoon*, 3 N. Y. 380, 53 Am. Dec. 307 and cases cited. The rule that a thief cannot convey a good title to stolen property has an exception in case of money or negotiable securities transferable by delivery, which have been put into circulation and have come into the hands of bona fide holders. The right of the owner to pursue and reclaim the money and securities there ends, and the holder is protected in his title. The plaintiff was in this position. The bonds, with the exception stated, had, as the evidence tends to show, been sold to bona fide purchasers, and she was precluded from following and reclaiming them.

The right of the plaintiff in equity to have the notes and mortgage while they remained in the possession of the felons or of their assignees with notice, subjected to a lien and trust in her favor, and to compel their transfer to her as the equitable owner, does not, we think, admit of serious doubt. The plaintiff, by the sale of the bonds to bona fide purchasers, lost her title to the securities. She could not

further follow them. She could maintain an action as for a conversion of the property against the felons. But this remedy in this case would be fruitless, as they are wholly insolvent. Unless she can elect to regard the securities in which the bonds were invested as a substitute, *pro tanto*, for the bonds, she has no effectual remedy. The thieves certainly have no claim to the securities in which the proceeds of the bonds were invested as against the plaintiff. They, without her consent, have disposed of her property, and put it beyond her reach. If the avails remained in their hands, in money, the direct proceeds of the sale, can it be doubted that she could reach it? It is not necessary to decide that, in the case supposed, she would have the legal title to the money, but if that question was involved in the case I should have great hesitation in denying the proposition. That she could assert an equitable claim to the money, I have no doubt. And this equitable right to follow the proceeds would continue and attach to any securities or property in which the proceeds were invested, so long as they could be traced and identified, and the rights of bona fide purchasers had not intervened.

In *Taylor v. Plumer*, 3 M. & Sel. 562, an agent, intrusted with a draft for money to buy exchequer bills for his principal, received the money and misapplied it by purchasing American stocks and bullion, intending to abscond and go to America, and absconded, but was arrested before he quitted England, and surrendered the securities and bullion to his principal, who sold them and received the proceeds. It was held that the principal was entitled to withhold the proceeds from the assignee in bankruptcy of the agent, who became bankrupt on the day he received and misapplied the money. Lord Ellenborough, in pronouncing the opinion in that case, said: "It makes no difference, in reason or law, into what other form different from the original the change may have been made, whether it be into that of promissory notes for the security of money produced on the sale of the goods of the principal as in *Scott v. Surman*, Willes, 400, or into other merchandise, as in *Whitecomb v. Jacob*, Salk. 160, for the produce or substitute for the original thing, still follows the nature of the thing itself so long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fails."

If, in the case now under consideration, the plaintiff had entrusted the Warners with the possession of the bonds, and they had sold them in violation of their duty, for the purpose of embezzling the proceeds, and invested them in the notes and mortgage in question, the plaintiff could, within the authority of *Taylor v. Plumer*, have claimed them while in their hands, or in the hands of their assignees with notice, and would be adjudged to have the legal title.

In the courts of equity the doctrine is well settled and is uniformly applied that when a person, standing in a fiduciary relation, misapplies or converts a trust fund into another species of property, the beneficiary will be entitled to the property thus acquired. The juris-

diction exercised for the protection of a party defrauded by the misappropriation of property, in violation of a duty, owing by the party making the misappropriation, is exceedingly broad and comprehensive. The doctrine is illustrated and applied most frequently in cases of trusts, where trust moneys have been, by the fraud or violation of duty of the trustee, diverted from the purposes of the trust, and converted into other property. In such case a court of equity will follow the trust fund into the property into which it has been converted, and appropriate it for the indemnity of the beneficiary. It is immaterial in what way the change has been made, whether money has been laid out in land, or land has been turned into money, or how the legal title to the converted property may be placed. Equity only stops the pursuit when the means of ascertainment fails, or the rights of bona fide purchasers for value without notice of the trust, have intervened. The relief will be moulded and adapted to the circumstances of the case, so as to protect the interests and rights of the true owner. *Lane v. Dighton*, Ambler, 409; *Mansell v. Mansell*, 2 P. Wms. 697; *Lench v. Lench*, 10 Vesey, 511; *Lewis v. Madocks*, 17 Ves. 56; *Perry on Trusts*, § 829; *Story's Eq.* § 1258.

It is insisted by the counsel for the defendants that the doctrine which subjects property acquired by the fraudulent misuse of trust moneys by a trustee to the influence of the trust, and converts it into trust property and the wrongdoer into a trustee at the election of the beneficiary, has no application to a case where money or property acquired by felony has been converted into other property. There is, it is said, in such cases, no trust relation between the owner of the stolen property and the thief, and the law will not employ one for the purpose of subjecting the avails of the stolen property to the claim of the owner. It would seem to be an anomaly in the law, if the owner who has been deprived of his property by a larceny should be less favorably situated in a court of equity, in respect to his remedy to recover it, or the property into which it has been converted, than one who, by an abuse of trust, has been injured by the wrongful act of a trustee to whom the possession of trust property has been confided. The law in such a case will raise a trust in invitum out of the transaction, for the very purpose of subjecting the substituted property for the purposes of indemnity and recompense. "One of the most common cases," remarks Judge Story, "in which a court of equity acts upon the ground of implied trusts in invitum, is when a party receives money which he cannot consistently withhold from another party." *Sto. Eq. Juris.* § 1255. And he states it to be a general principle that "wherever the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held in its new form liable to the rights of the original owner, or the cestui que trust. (Section 1258. See, also, *Hill on Trustees*, p. 222.)

We are of opinion that the absence of the conventional relation of trustee and cestui que trust between the plaintiff and the Warners, is no obstacle to giving the plaintiff the benefit of the notes and mortgage, or the proceeds in part of the stolen bonds. See *Bank of America v. Pollock*, 4 Edw. Ch. 215.

[The Court then concluded that the trial judge was justified by the evidence in finding that the defendants had notice of the larceny of the bonds, and the use made of the money arising from their sale, at the time they received the notes and mortgage and therefore affirmed the judgment.]¹⁰

AMERICAN SUGAR REFINING CO. v. CHARLES H. FANCHER, Assignee.

(Court of Appeals of New York, 1895. 145 N. Y. 552, 40 N. E. 206, 27 L. R. A. 757.)

Appeal from order of the General Term of the Supreme Court in the First Judicial Department, made at the October Term, 1894, which reversed an interlocutory judgment in favor of plaintiff, entered upon the report of a referee and the final judgment entered thereon, and ordered a new trial.

This action was brought by plaintiff against defendant, as assignee, for the benefit of creditors of the firm of C. Burkhalter & Co., to recover the proceeds of the re-sale of certain goods alleged to have been fraudulently purchased from plaintiff by said firm.

The interlocutory judgment adjudged defendant a trustee of the goods mentioned in the complaint, and of the proceeds of such goods as had come into his hands as assignee, and that he account for, transfer and pay over to plaintiff all of said proceeds; a reference was ordered for the purpose of the accounting. A stipulation was afterwards entered into between the parties as to the amount of the proceeds received by defendant, and a final judgment in plaintiff's favor in accordance therewith was rendered.

ANDREWS, C. J. This case presents a question of considerable practical importance. It relates to the equitable jurisdiction of the court under special circumstances to follow proceeds of personal property in the hands of a fraudulent vendee or his general assignee for the benefit of creditors at the suit of a defrauded vendor, who by false pretences was induced to part with the property on credit, the proceeds sought to be reached being the sums due from sub-vendees of the fraudulent purchaser arising on re-sales by him made before the discovery by the plaintiff of the fraud. The facts upon which the question

¹⁰ *Cattley v. Loundes*, 34 W. R. 139 (1885); *In re Hulton*, 39 W. R. 303 (1891); s. c. 8 Morrell, Bankpt. Rep. 69; *Pirtle v. Price*, 31 La. Ann. 357 (1879); *National Mahaiwe Bank v. Barry*, 125 Mass. 20 (1878); *Nebraska Nat. Bank v. Johnson*, 51 Neb. 546, 71 N. W. 294 (1897); *Lamb v. Rooney*, 72 Neb. 322, 100 N. W. 410, 117 Am. St. Rep. 795 (1904).

arises are substantially conceded and are free from complication. Between the 20th day of September, 1892, and the 20th day of October following, the plaintiff sold and delivered to the mercantile firm of C. Burkhalter & Co., doing business in the City of New York, sugars of various qualities on credit for the price in the aggregate of \$19,121.41, no part of which has been paid, the last sale having been made October 19th, 1892. On the next day, the firm being insolvent and owing debts greatly in excess of its assets, made a general assignment to the defendant for the benefit of its creditors. Among the assigned assets were a portion of the sugars sold by the plaintiff to the firm, which he replevied from the assignee, but the firm, prior to the assignment, had sold to numerous persons, customers of the firm, in the ordinary course of trade, portions of the sugars on credit, and claims held by the firm against the sub-vendees arising out of such sales, exceeding in the aggregate the sum of \$10,000, were among the assets which passed by the assignment. These claims were collected by the assignee after the assignment, and (excepting a small sum) after notice had been served by the plaintiff on the assignee that it rescinded the original sale for fraud, which notice was accompanied by a demand for the sugars then in the possession of the assignee, and for an accounting and the delivery to the plaintiff of the outstanding claims against the customers of Burkhalter & Co., in their hands for the sugars sold by the firm as above stated. The assignee declined to accede to the demand made. On the trial the parties by stipulation fixed the amount of the claims for sugars sold which had come to the hands of the assignee and which had been collected by him.

The fraud of Burkhalter & Co. was not controverted. It was shown that the sales were induced by a gross misrepresentation in writing made by one of the members of the firm to the plaintiff as to the solvency of the firm, made on or about September 20th, 1892, within thirty days before the assignment, and when the firm was owing several hundred thousand dollars more than the value of its whole assets.

The case presented is singularly free from any uncertainty in respect to the facts upon which the equitable jurisdiction to follow the proceeds of the sugars is claimed. They are definite and ascertained, but it is insisted that the court is impotent to give relief by way of subjecting the choses in action or their proceeds, representing the sugars, to a lien in favor of the defrauded vendor, or to adjudge that they shall be applied in partial recompense and restitution for the property so wrongfully obtained, because, as is claimed, such relief is not in any such case within the scope of the powers of courts of equity as heretofore defined and exercised, and for the further reason that new rights have intervened by reason of the assignment. The fraud of Burkhalter & Co. was, as we have said, admitted. They are hopelessly insolvent, and were so at the time they took the plaintiff's goods. They disposed of a large part of the sugars before the plaintiff became cognizant of the fraud. The plaintiff was only apprised of it

after the assignment was made. The remedy at law upon the contract against the fraudulent and insolvent purchaser is, under the circumstances, ineffectual. The pursuit of the property, except the small part of it which was unsold and passed to the assignee, is impracticable. If it yet be found unconsumed and capable of identification, the multiplicity of suits which would be rendered necessary to reclaim it would make the remedy expensive, burdensome and inadequate. The identification of the proceeds sought to be reached is complete and unquestioned. It is not claimed that the credits or the money into which they have been converted are not the very proceeds of sugars of which the plaintiff was defrauded.

The jurisdiction of a court of equity to follow the proceeds of property taken from the true owner by felony, or misapplied by an agent or trustee, and converted into property of another description, and to permit the true owner to take the property in its altered state as his own, or to hold it as security for the value of the property wrongfully taken or misapplied, or, in case the original property or its proceeds have been mingled with that of the wrongdoers in the purchase of other property, to have a charge declared in favor of the person injured to the extent necessary for his indemnity, so long as the rights of bona fide purchasers do not intervene, has been frequently exerted and is a jurisdiction founded upon the plainest principles of reason and justice. The case of *Newton v. Porter*, 69 N. Y. 133, 25 Am. Rep. 152, is an illustration of the application of this principle in a case of the larceny of negotiable bonds, sold by the thieves, in which the court subjected securities in which they invested the money, and which they had transferred with notice to third persons as security for services to be rendered, to a charge in favor of the owner of the stolen bonds. The cases upon this head are very numerous, where there has been a misapplication of trust funds by trustees, or persons standing in a fiduciary relation, and the money or property misapplied has been laid out in land or converted into other species of property. The court in such cases lays hold of the substituted property and follows the original fund, through all the changes it has undergone, until the power of identification is lost or the rights of bona fide purchasers stop the pursuit, and holds it in its grasp to indemnify the innocent victim of the fraud. And even in case of money, which is said to have no earmark, its identity will not be deemed lost, though it is mingled with other money of the wrongdoer, if it can be shown that it forms a part of the general mass. *Pennell v. Deffell*, 4 De G., M. & G. 372; *In re Hallett*, 13 Ch. Div. 696; *Holmes v. Gilman*, 138 N. Y. 369, 34 N. E. 205, 20 L. R. A. 566, 34 Am. St. Rep. 463. In the cases of stolen property, or of misapplication by a trustee or agent of the funds of the principal or cestui que trust, the title of the real owner of the property has been in most cases lost, without his consent, and the court, by a species of equitable substitution, repairs, as far as practicable, the wrong, and prevents the wrongdoer from profiting by his

fraud. And, indeed, courts of law, borrowing the equitable principle, in case of misapplication by agents, vest in the principal at his election the legal title to a chattel or security in the hands of the agent, purchased exclusively by the application of the embezzled or misapplied fund. *Taylor v. Plumer*, 3 M. & S. 562.

It is at this point that the controversy in the present case commences, and the divergence arises which has led to this litigation. It is claimed, on behalf of the defendant, that courts of equity in commercial cases, where the claim of the plaintiff originates in a fraud in the sale of personal property, does not undertake to follow proceeds in the hands of the wrongdoer, but that the defrauded party having consented to part with his title, is remitted exclusively to such legal remedies as are given for the redress of the wrong. The jurisdiction of courts of equity in cases of trusts or agency, or cases of like character, it is insisted, is founded upon the ancient jurisdiction of these courts over trusts and fiduciary relations, and has not been and ought not to be extended beyond these cases. It is very true that trusts and trust relations are peculiarly cognizable in equity, and have been so cognizable from the earliest period of equity jurisprudence. But it is to be said that these are but branches of the larger jurisdiction over frauds, which equity abhors, and of which it has cognizance admittedly in many cases not connected with technical trusts or agency. It cannot be denied that the protection of cestui que trusts against frauds of the trustee is an object of peculiar solicitude in courts of equity. They, in many cases, are incapable, by reason of age, inexperience or other incapacity, from looking out for themselves, and the court stands in the attitude of guardian of their interests. But, as has been said, a court of equity does not restrict its remedial processes to the aid of the helpless or the ignorant. It embraces within its view the general claims included within what are called quasi trusts, and intervenes to prevent violations of equitable duty by whomsoever committed or whoever may suffer from the violation. It goes altogether outside of trust relations in many cases to prevent fraud, or to compel a restitution of property obtained by fraud. The exercise of the jurisdiction to set aside fraudulent transfers of real or personal property made in fraud of creditors is familiar. And the jurisdiction is most beneficially invoked in cases of private fraud to rescind transfers of real estate procured by fraudulent representations, and to restore to the defrauded vendor the title of which he has been defrauded. It often happens in cases of transfers of real estate procured by fraud, that before the action is brought or the plaintiff is apprised of the fraud, the fraudulent vendee has disposed of the land in whole or in part, or has created liens thereon in favor of the bona fide purchasers for value. In such cases the court will mould the relief to suit the circumstances, and will, at the election of the plaintiff, rescind the contract and compel a re-conveyance of the part of the land still remaining in the hands of the vendee, and compel the wrongdoer to account for the proceeds of

the land sold, or award compensation in damages. The court in many cases resorts to the fiction of a trust, and, by construction, adjudges that the proceeds in the hands of the wrongdoer are held by him as trustee of the plaintiff. This was the exact nature of the relief granted in the case of *Trevelyan v. White*, 1 Beav. 589, as appears by the recital of the decree in the opinion of the master of the rolls, where part of the estate had been sold by the fraudulent vendee. In *Cheney v. Gleason*, 117 Mass. 557, a bill was filed by the defrauded vendor of real estate to reach a mortgage taken by the vendee on the land on a re-sale by him, and the court sustained the bill and granted the relief. In *Hammond v. Pennock*, 61 N. Y. 145, the court rescinded, at the instance of the plaintiff, a contract for the exchange of real and personal property, owned by the plaintiff, for a farm of the defendant in Michigan, which had been consummated on the plaintiff's part by a conveyance and transfer, the contract and conveyance having been obtained by the defendant by fraudulent representations; and the defendant having, after the conveyance to him, contracted to sell part of the land conveyed to him by the plaintiff, the court adapted the relief to the circumstances and rescinded the conveyance so far as practicable, and adjudged that the defendant account for the proceeds of the personal property included in the sale. If the jurisdiction exercised by courts of equity in respect to undoing fraudulent conveyances of real estate and following the proceeds in the hands of the fraudulent grantee, appertains in like manner and degree to sales of personalty, it would seem that the plaintiff in the present case was entitled to relief.

The fact that before the action was brought, *Burkhalter & Co.* had made a general assignment for benefit of creditors to the defendant is no obstacle to the relief, if, except for the assignment, the court would have interposed, on the prayer of the plaintiff, its preventive and other remedies, to have enabled the plaintiff to reach the unpaid claims against the sub-vendee. As assignee for creditors he is not a purchaser for value, and stands in no other or better position than his assignor as respects a remedy to reach the proceeds of the sales. *Goodwin v. Wertheimer*, 99 N. Y. 149, 1 N. E. 404; *Barnard v. Campbell*, 58 N. Y. 76, 17 Am. Rep. 208; *Ratcliffe v. Sangston*, 18 Md. 383; *Bussing v. Rice*, 2 Cush. (Mass.) 48. It is claimed that the general creditors of the firm will be prejudiced if the plaintiff is allowed to prevail, and that he will thereby acquire a preference over the other creditors of the insolvent firm. But general creditors have no equity or right to have appropriated to the payment of their debts the property of the plaintiff, or property to which it is equitably entitled as between it and *Burkhalter & Co.* They, so far as appears, advanced nothing and gave no credit on the faith of the firm's possession of the sugars, assuming that that element would have had any bearing on the case. If the sugars had existed in specie in the hands of the assignee it cannot be doubted that the plaintiff on rescinding the

sale would have been entitled to retake them, and the general creditors are in no worse position, if the plaintiff is awarded the proceeds, than they would have been if the sugars had remained unsold.

Much was said on the argument upon the difference between a trespasser taking and disposing of the property of another and the case of a sale of personal property to a vendee induced by fraud. It is the law of this State, as in England, that title passes on such a sale to the fraudulent vendee, notwithstanding that the crime of false pretences is included in the statute definition of a felony, but which was not such at common law. *Barnard v. Campbell*, supra; *Wise v. Grant*, 140 N. Y. 593, 35 N. E. 1078; *Benj. on Sales* (6th Ed.) § 433; *Fassett v. Smith*, 23 N. Y. 252; *Benedict v. Williams*, 48 Hun, 124. But a purchase procured by fraud is in no sense, as between the vendor and vendee, rightful. It was wrongful, and while a transfer so induced vests a right of property in the vendee until the sale is rescinded, the means and act by which it was procured was a violation of both a legal and moral duty. But the rule is that a sale of personal property induced by fraud is not void, but is only voidable on the part of the party defrauded. "This does not mean that the contract is void until ratified; it means that the contract is valid until rescinded." When a contract of sale infected by fraud of the vendee is consummated and the property delivered, the vendor on discovering the fraud may pursue one of several courses. He may affirm the contract, and an omission to disaffirm within a reasonable time after notice of the fraud will be deemed a ratification. He may elect to rescind it, and thereby his title to the property is re-instated as against the purchaser and all persons deriving title from him, not being bona fide purchasers for value, and a purchaser is not such who takes the property for an antecedent debt or who purchased the property on credit and has not paid the purchase money or been placed in a position where payment to a transferee of the claim cannot be resisted. *Barnard v. Campbell*, supra; *Dows v. Kidder*, 84 N. Y. 121; *Matson v. Melchor*, 42 Mich. 477, 4 N. W. 200; *Benj. on Sales*, p. 570, note. Upon rescission the vendor may follow and retake the property wherever he can find it, except in the case mentioned, or he may sue for conversion.

When these legal remedies are available and adequate, clearly there is no ground for going to a court of equity. The legal remedies in such case are and ought to be held exclusive. But in a case like the present, where there is no adequate legal remedy, either on the contract of sale or for the recovery of the property in specie, or by an action of tort, is the power of a court of equity so fettered that where it is shown that the property has been converted by the vendee and the proceeds, in the form of notes or credits, are identified beyond question in his hands, or in possession of his voluntary assignee, it cannot impound such proceeds for the benefit of the defrauded vendor? The only reason urged in denial of this power, which to our minds have any force, is based on the assumption that it would be contrary to public

policy to admit such an equitable principle into commercial transactions. But with the two limitations adverted to, and which ought strictly to be observed, (1) that it must appear that the plaintiff has no adequate remedy at law, either in consequence of insolvency, the dispersion of the property or other cause, and (2) that nothing will be adjudged as proceeds except what can be specifically identified as such, business interests will have adequate protection. Indeed, the disturbance would be much less than is now permitted in following property from hand to hand until a bona fide purchaser is found.

The case of *Small v. Atwood, Younge*, 507, is a very instructive case, which involved a large amount, was argued by eminent counsel and received great consideration. It supports, we think, the equitable jurisdiction invoked in the present case. It was an action by the purchaser to rescind a contract for the sale of mines and mining property induced by fraudulent representations, and to recover the purchase money paid to the amount of about £200,000. The court found the fraud and rescinded the contract, and made a decree for an accounting. On a supplemental bill being filed, showing that the purchase money paid had been invested by the seller in public securities in his name, which he afterwards caused to be put in the name of his mother, and that the purchaser had no other means adequate to repay the purchase money, the Chancellor, on an application for an injunction restraining the transfer of the securities, held that the money paid could be followed into the stock purchased, and granted the injunction. The case of *In re Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504, was an attempt to fasten upon the estate of an insolvent a preferential lien for money put into his hands by the plaintiff for the purchase of a mortgage for her, and which he applied, without authority, to the payment of his debts, before the assignment, with the exception of a small sum (\$30.00) which went into the hands of the assignee. The court held that the money, which the insolvent had used to pay debts prior to the assignment, was not a preferred debt, but sustained her right to be paid the small sum which the assignee retained belonging to the trust. This case points the distinction. The character of the debt gave it no priority. The fund had been dissipated and could not be traced among the assigned assets. There was no equitable ground of preference except for the small sum mentioned.

Upon the whole case, we are of the opinion that the judgment on the report of the referee was correct, and the order granting a new trial should, therefore, be reversed and the judgment on the report of the referee affirmed, with costs.¹¹

Judgment accordingly. All concur.

¹¹ *Small v. Atwood, Younge*, 407, 533-538 (1832); *Taub v. McClelland-Colt Co.*, 10 Colo. App. 190, 51 Pac. 163 (1897); *Farwell v. Kloman*, 45 Neb. 424, 63 N. W. 798 (1895); *Bank of America v. Pollock*, 4 Edw. Ch. (N. Y.) 215 (1843); *Converse v. Sickles*, 146 N. Y. 200, 40 N. E. 777, 48 Am. St. Rep. 790 (1895); *Reynolds v. Aetna Life Ins. Co.*, 28 App. Div. 591, 51 N. Y. Supp. 446 (1898); *affd.* 160 N. Y. 635, 55 N. E. 305 (1899); *Menz v. Beebe*, 102 Wis. 342, 77 N. W. 913, 78 N. W. 601 (1899).

HUMPHREYS v. BUTLER.

(Supreme Court of Arkansas, 1888. 51 Ark. 351, 11 S. W. 479.)

Appeal from Pulaski Chancery Court; D. W. Carroll, Chancellor.

BATTLE, J.¹² Edward Johnigan enlisted in the army of the United States during the late war between the States, and died in the service, and before the close of the war. At the time he enlisted he had a wife, Clarissa by name, and when he died he left her surviving. He also had a brother Jacob, who survived him. In 1871 Jacob, without the knowledge, consent or authority of his brother's widow, collected from the United States \$149.52, as bounty due his brother Edward, and invested it in a certain lot in Little Rock, which he purchased, and which cost him \$400. Clarissa married one Butler. Having discovered Jacob's collection and investment, they brought this action to divest him of the title to the lot, and to vest it in Clarissa, or to recover a decree for the amount collected in favor of Clarissa, and to have it decreed a lien on the lot and the lot sold to satisfy the same.

The amount due Edward as bounty at the time of his death rightfully belonged to his widow. There is no controversy about Jacob having collected it, or the amount collected; and we think that the evidence clearly shows that he invested it in the lot. But it is insisted that he stood in no fiduciary relation to Clarissa, and that when he collected the money due her, and invested it in the town lot, no trust resulted to her. It is true that he stood in no relation of confidence or trust to her. But it is not necessary that such a relation should have existed to entitle her to relief against the lot. Equity created a trust in invitum out of the collection and the investment of her money in the lot, with the view of subjecting the lot to the purposes of indemnity and recompense.

"One of the most common cases," says Judge Story, "in which a court of equity acts upon the ground of implied trust in invitum, is where a party receives money which he cannot conscientiously withhold from another party." And he states it to be a general principle that "whenever the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held in its new form liable to the rights of the original owner, or the cestui que trust." Story's Eq. Jur. §§ 1255, 1258.

In 2 Pomeroy's Equity Jurisprudence, the author says: "In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments or through undue influence, duress, taking advantage of one's necessities or weakness, or through any other similar means or under any other similar circumstances, which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity im-

¹² A part of the opinion is omitted.

presses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right and takes the property relieved from the trust. The forms and varieties of these trusts, which are termed *ex maleficio* or *ex delicto*, are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer." Section 1053.

It has been held that equity will charge land paid for in part with the proceeds of stolen property with a trust in favor of the owner of the property for the amount so used. *National Mahaiwe Bank v. Barry*, 125 Mass. 20; *Newton v. Porter*, 69 N. Y. 133, 25 Am. Rep. 152; *Bank of America v. Pollock*, 4 Edw. Ch. (N. Y.) 215.

There is no good reason why the owner of property taken and converted by one who has no right to its possession, should be less favorably situated in a court of equity, "in respect to his remedy to recover, or the property into which it has been converted, than one who by an abuse of trust has been injured by the wrongful act of a trustee to whom the possession of trust property has been converted." "The beautiful character, pervading excellence, if one may say so, of equity jurisprudence," says Judge Story, "is that it varies its adjustments and proportions so as to meet the very form and pressure of each particular case, in all its complex *habitudes*." While in the former case no relation of confidence or trust exists, it impresses a constructive trust upon the property obtained by the conversion for the benefit of the party whose effects have been used in obtaining it; and, when such effects or the proceeds thereof, were a part of the price paid, it makes the property so obtained chargeable with an equitable lien in favor of such party and entitles him to a "judgment for the sale of the property as upon foreclosure in default of payment within a time named." *Bresnihan v. Shehan*, 125 Mass. 11, and cases cited; *Wallace v. Duffield*, 2 Serg. & R. (Pa.) 521, 7 Am. Dec. 660; *Day v. Roth*, 18 N. Y. 448. * * *

Appellee, Clarissa Butler is entitled to judgment for the \$149.52, and six per cent. per annum interest thereon. Inasmuch as the evidence does not show when the money was actually received, and does show that it was invested in the lot on the 14th of October, 1871, the interest should be computed from that date. The \$149.52 being only a part of the price paid for the lot, she should have a lien thereon for the amount due her, and a decree for the sale of the lot to satisfy the lien in default of payment, within a specified time. 2 Perry on Trusts (3d Ed.) § 842; *Scale v. Baker*, 28 Beavan, 91; *Price v. Blackmore*, 6 Beavan, 507; *Lewis v. Maddocks*, 17 Ves. 48.

The decree of the Chancery Court is reversed, and the cause is remanded, with an instruction to the Court below to enter a decree in conformity with this opinion, and for other proceedings.¹³

BONESTEEL v. BONESTEEL.

(Supreme Court of Wisconsin, 1872. 30 Wis. 516.)

Appeals from the Circuit Court for Dodge County.

The case presents two cross appeals from different parts of one and the same judgment. The plaintiff, Belinda R. Bonesteel, brought her action against the defendant, Jacob P. Bonesteel, upon a promissory note executed by defendant to plaintiff. The answer admitted the making of the note, but alleged that it was without consideration, having been given under threats, and to avoid trouble and annoyance. The answer further alleged, by way of counterclaim, that before the making of the promissory note in question, defendant, with one Conklin, was owner of certain gold claims of great value, in Colorado, the title to which was in one Gorsline, in trust for defendant and Conklin, and that Gorsline conveyed the claims to the plaintiff in trust for defendant and Conklin, subject to Gorsline's claim for services in negotiating the sale of the claims; that by the terms of the agreement, plaintiff was to sell the claims, and after settling with Gorsline, to account to defendant and Conklin for the balance of the proceeds received on the sale of said trust estate; that plaintiff afterwards sold said claims and trust estate, to one McLaughlin, but after settling with Gorsline, had withheld from defendant his share of the proceeds, and had neglected and refused to account for the money received by her, out of said trust estate, and had converted the same to her own use. Plaintiff, by her reply, admitted the ownership of the gold claims by defendant and Conklin, the title being held in trust for them by Gorsline, and alleged that her husband had purchased the claims of defendant and Conklin, for value, and at the time of such purchase, and before plaintiff conveyed to McLaughlin, it was agreed between her husband, and the defendant and Conklin, but without her knowledge and consent, that the conveyance from Gorsline should be taken in the name of plaintiff; that in pursuance of such agreement, Gorsline afterwards nominally conveyed the claims to plaintiff, but without her knowledge, consent or privity; that she never accepted of any trust in relation to said claims, or any of the proceeds thereof under the deed, nor was the deed ever delivered to her, and that she knew nothing thereof, until one year afterward, when she joined with her husband in conveying to McLaughlin, and that plaintiff never received any money,

¹³ *La Comité v. Standard Bank*, 1 Cababe & Ellis, 87 (1883); *In re Woods & Malone* (D. C.) 121 Fed. 599 (1903); *Graves v. Pinchback*, 47 Ark. 470, 1 S. W. 682 (1886).

either as trustee or otherwise, from any person on account of said claims, but that her husband had had the sole control thereof, and had received all the money therefor. The evidence is sufficiently stated in the opinion. The court found as facts: 1st, that the note set forth in the complaint as the foundation for plaintiff's cause of action, was without consideration, and that nothing was due plaintiff thereon; 2d, that plaintiff did not receive the gold claims in trust, and was not liable to account therefor. As conclusions of law, the court found: 1st, that plaintiff take nothing by her complaint; 2d, that defendant take nothing by his counterclaim. Judgment for defendant for costs. Defendant excepted to the second finding of fact and second conclusion of law, and appealed. Plaintiff excepted to the first finding of fact and first conclusion of law, and appealed.

COLE, J.¹⁴ These are cross-appeals from different parts of the same judgment.

In respect to the finding and judgment of the court below against the counterclaim, set up in the defendant's answer, we think the evidence was insufficient to charge the plaintiff as trustee of those funds. It does not appear that she had any knowledge of the trust, or accepted it. The facts, mainly relied on to show that she knew of the trust and accepted it, are these: The trust property was conveyed to her by Judge Gorsline without any consideration being paid by her therefor. She united with her husband in conveying this same property to McLaughlin. A large portion of the proceeds of the sale of the gold claims was subsequently placed to her credit, on the bank books of Mr. Baker, which she drew out on her own checks.

The conveyance by Gorsline was made in the absence of the plaintiff, and without her knowledge, at the instigation of the defendant and the plaintiff's husband. She states, in her answer, that the deed was never delivered to her, and testifies in her deposition that there never was any property or gold claims conveyed to her by Gorsline, in trust for the defendant and Conklin; that she never accepted any such trust; never sold any such claims; nor received any money for them. There is, really, no evidence to contradict her upon these points. Suppose she had seen the conveyance from Gorsline to her. It is not claimed that this conveyance expressed that the property was conveyed in trust for any one. She states that after the commencement of this suit, she was informed that her husband took a conveyance of these gold claims in her name, and she doubtless supposed that they were his property. When she executed the deed to McLaughlin with her husband, she was of the same impression. She was entirely ignorant of the fact that the defendant had any interest whatever in the gold claims—if such was really the case—and the parties conducting the business seem to have carefully concealed from her, as well as others, the real nature of these transactions. Whether

¹⁴ A part of the opinion is omitted.

this concealment was resorted to for a fraudulent purpose, to place these claims beyond the reach of creditors, we need not inquire. But certain it is, that the plaintiff did not know, and had no means of finding out, that these claims had been conveyed to her in trust, and therefore the fact that she united with her husband, in conveying them to McLaughlin, is not such an act as ought, under the circumstances, to charge her with the trust, for she doubtless supposed that the claims belonged to her husband, and that the money which was received from the sale of this property was likewise his. In this case, if there was any evidence from which it could be assumed that the plaintiff knew that the property was conveyed to her by Gorsline, in trust; or, that the proceeds of the sale belonged to the defendant, there would be some ground for holding her liable in this action as trustee. But there is no such evidence, and nothing whatever to inform her, that these moneys belonged to the defendant. We, therefore, fully agree with the court below, in the conclusion that she never received these moneys mentioned in the counterclaim in trust, and is not liable to account therefor. * * *

Judgment affirmed.

MAST & CO. v. HENRY et al.

(Supreme Court of Iowa, 1884. 65 Iowa, 193, 21 N. W. 559.)

Action in equity to subject real estate to payment of certain judgments recovered by the plaintiff against the defendant, G. W. Henry, which real estate, the plaintiff claims, Henry conveyed to his daughter and co-defendant, M. E. Henry, for the purpose of defrauding his creditors. The court found for the defendant and entered a decree accordingly. The plaintiff appeals.

SEEVERS, J. In 1874 Fiske & Co. recovered a judgment against both of the defendants, and Hapgood & Co. recovered a judgment about the same time against G. W. Henry alone. G. W. Bassett was attorney for the judgment plaintiffs. The evidence warrants the conclusion that M. E. Henry was the principal debtor on the Fiske judgment. At that time G. W. Henry was the owner of Lot 1, in Block 15 in Fort Dodge, and he conveyed the same to M. E. Henry on the 1st day of September, 1874. No consideration was paid by M. E. Henry for such conveyance. In the same month, but afterwards, Fiske & Co. sold said lot under execution issued on their judgment. It was sold in subdivisions 1, 2, 3 and 4, and D. B. Fiske became the purchaser, and received a certificate of purchase. In June, 1875, Hapgood & Co. redeemed sub-lot 4 from said sale, and the certificate of purchase was assigned to said firm. Afterwards, Hapgood & Co. assigned the certificate of purchase to M. E. Henry, and the sheriff conveyed sub-lot 4 to her in October, 1875, and sub-lots 1, 2 and 3 were at the same time conveyed to D. B. Fiske by the

sheriff, and in November thereafter, Fiske conveyed the same to Bassett. A few days thereafter Bassett quit-claimed sub-lot 2 to M. E. Henry, and she at the same time quit-claimed sub-lots 1 and 3 to Bassett. Afterwards, in November, 1875, all of said sub-lots were sold for delinquent taxes to Bassett, and in 1878 the treasurer conveyed the same to him. Thereafter Bassett quit-claimed sub-lot 4 to M. E. Henry, and she quit-claimed sub-lot 2 to him. If these several conveyances are regarded as valid against the plaintiff, then, when this action was commenced, M. E. Henry only owned sub-lot 4, and the question is whether it can be subjected to the payment of the plaintiff's judgments. There is no evidence showing bad faith on the part of Bassett, and he must be regarded as a purchaser in good faith and for value of D. B. Fiske. He held the title to sub-lots 1, 2 and 3 under such conveyance, free from equities in favor of the plaintiff. But the contention of the plaintiff's counsel is that M. E. Henry cannot be regarded as such a purchaser, because the whole of lot 1 was conveyed to her in fraud of the rights of the plaintiff; that she had notice of the plaintiff's equities, and therefore cannot be regarded as a purchaser in good faith; and that she is not protected, although she obtained title from Bassett, who was a purchaser in good faith and for value. In support of this proposition, 2 Pom. Eq. § 754, is cited.

Counsel for the plaintiffs reply that the authority cited does not apply, because no actual fraud on the part of either of the defendants in making such conveyance has been established. It is conceded, however, by counsel that M. E. Henry was a mere volunteer, and that the conveyance to her was void as to existing creditors. To such a party, however, counsel claim that the rule above stated has no application. Counsel for the plaintiffs further contend that the conveyance by the sheriff to M. E. Henry of sub-lot 4 should be regarded as a redemption merely, because it was sold for her debt, which she was primarily to pay. It is true that she was the principal debtor on the Fiske judgment, but she was not liable on the Hapgood judgment. To obtain the certificate of purchase, or to redeem from the sale, whichever it may be regarded, required nearly \$400, and we find that the required amount was paid by M. E. Henry. To redeem from the sale under the Fiske judgment did not require more than \$175. But Hapgood was the bona fide holder of the certificate of purchase, and to obtain an assignment thereof, M. E. Henry was required to and did pay, as we find from the evidence, about \$225 in addition, to Hapgood, for which she in no respect was liable.

We are unable from the evidence to conclude that M. E. Henry received the conveyance of lot 1 from her father for the purpose of defrauding his creditors. But the title, while it remained in her, was liable to be divested at the instance of existing creditors of her father, because she had paid no consideration therefor. While she held the legal title of sub-lot 4 under the conveyance from the sheriff,

said sub-lot was sold for delinquent taxes to Bassett, and he thereafter obtained a treasurer's deed. The validity of the tax title in Bassett is in no manner assailed, and the evidence warrants no other conclusion than that Bassett acted, in procuring such title, adversely to the defendants. When the tax sale was made, M. E. Henry owned the legal title to both sub-lots 2 and 4. When the title became vested in Bassett, she and her father were in possession of sub-lot 2. For the purpose of getting possession of the last named lot without litigation Bassett quit-claimed all his interest in sub-lot 4 to M. E. Henry. As Bassett's title under the tax deed was valid, and vested in him the absolute title, we think he could convey to M. E. Henry, and she would become vested with a good title, although she may have had notice of the plaintiffs' equities, as above stated. She had not been guilty of fraud, but, at most, was a mere volunteer, with notice. 2 Pom. Eq. § 754, and authorities cited in note 2.

WHEELER and GREEN v. GEORGE KIRTLAND and Others
(two cases).

G. W. KIRTLAND v. JOHN KIRTLAND and Others.

(Court of Chancery of New Jersey, 1872. 23 N. J. Eq. 13.)

These three suits were brought on for final hearing together, each upon bill, answer, replication, and proofs.

Wheeler and Green, the complainants in the first two suits, had, on the 16th day of December, 1869, recovered judgment in the Supreme Court of the state against the defendants, George Kirtland and John Kirtland (who had been partners under the name of Kirtland & Co.), for \$68,246. By an execution on this judgment they had levied upon a lot of land of six and one-half acres, in Orange, known as the Halsted Homestead, the title to which was in the name of Emily G. Kirtland, the wife of George Kirtland; and on a tract of land and messuage, the property of John Kirtland, also in Orange, encumbered by two mortgages to George W. Kirtland, one for \$4,000 in his own right, and one for \$75 to him as trustee for Catharine Kirtland, the wife, and Jared T. Kirtland, the son of John Kirtland, and by a judgment confessed by John Kirtland to George W. Kirtland, in Essex County Circuit Court, for \$16,714.42.

The bill in the first suit seeks to have the judgment, of the complainants declared a lien on the Halsted Homestead on the ground that the same was purchased and paid for by George Kirtland out of the assets of the firm when insolvent, and the title taken in the name of his wife to protect it from the debts of the firm, and to hinder and defraud their creditors.

The bill in the second suit alleges that the mortgage held by George W. Kirtland on the premises of John, as trustee for Catharine and

Jared, was voluntary, and given without consideration when John Kirtland and his firm were insolvent, and seeks to have it declared fraudulent and void as against the complainants and their judgment.

The third suit is by George W. Kirtland to foreclose his mortgage for \$4,000, and his mortgage as trustee. It also seeks to have that mortgage reformed by correcting a mistake of the scrivener, who, in drawing it, had substituted the word "successors" for "heirs," after the name of the mortgagee, in the granting clause; and further, to have the amount due on his judgment made out of the sale of the mortgaged premises. The defendants, Wheeler and Green, contest the bona fides and validity of both these mortgages, and of the judgment, and allege that they all are without consideration, and intended to delay and defeat creditors.

THE CHANCELLOR [ABRAHAM O. ZABRISKIE]. I shall first consider the question with Emily G. Kirtland, as to the Halsted Homestead.¹⁵ She was the daughter of M. O. Halsted, an old, respectable, and wealthy resident of Orange, who had lived on this property for more than forty years. Emily had been born there, and had resided on it until she was married to George Kirtland, in September, 1863, and still continues to reside there. She continued, after her marriage, to reside there in the family of her parents until March 5, 1864, when the place was conveyed to her in fee by her father; after that, she and her husband conducted the establishment, and her father and mother boarded with them. For some time before her marriage her father had talked of selling this place, and asked \$25,000 for it. In the winter after her marriage, and for some two months before the conveyance, she had been bargaining with her father for the purchase of this place, and concluded the bargain for the price of \$25,000, of which \$5,000 was to be paid by charging it as an advancement to her, and the \$20,000 was to be paid in cash. This sum was advanced by her husband by a check of his firm for that sum, intended as a gift to her. She was the only remaining daughter or child, the others having been previously married. Her father gave her the furniture in the house. Mr. Halsted never drew the money for which the check was given, or used it in any way, but handed it the next morning to George Kirtland, who took it back to the firm, giving Mr. Halsted credit in their books for the amount, \$20,000. The firm from time to time bought bonds for Mr. Halsted to that amount, their business being that of bankers and stock and exchange brokers in the City of New York. These bonds were left with Kirtland & Co., and were used by them as collaterals for raising money, under an understanding with Mr. Halsted. On the 10th day of November, 1864, Kirtland & Co. failed, and stopped payment, and on the 25th made an assignment of their New York assets for the benefit of certain creditors.

On the 24th day of November, 1864, two weeks after the failure, Mr. Halsted advanced on a mortgage of the Homestead \$14,000,

¹⁵ Only so much of the opinion as deals with this question is given.

which was handed over to George Kirtland for the payment of the debts of the firm, and on the 4th of November, 1865, he loaned \$6,000 more on a second mortgage of the same property, which was handed to George for the same purpose. These sums, or by far the greater part of them, were used in paying the debts of the firm, part in paying a debt for which \$10,000 of Mr. Halsted's bonds were pledged, part in payment of a debt for which \$17,000 of borrowed Tennessee bonds had been pledged, and the rest for other debts.

Mrs. Emily G. Kirtland retained possession of her homestead, and the lands having risen much in value, sold different parcels of it for large prices, and with these moneys, and the amount which came to her as her share of the estate of her father, who died in 1866, being about \$20,000, she has nearly paid off the mortgages. The judgment of Wheeler and Green in this state was obtained more than five years after the failure, and after these sales and payments.

The above statement of facts is the conclusion to which I have arrived from consideration of the testimony, and is fully established by the evidence.

I shall assume it also as established by the evidence, that the firm of Kirtland & Co. were, on the 5th of March, 1864, largely insolvent, although upon this point there is contradictory testimony. I shall also assume that George Kirtland knew of the insolvency. He denies, under oath, that the firm was then insolvent, or that he thought that it was; and his ignorance of, and incapacity for business displayed in his testimony, if not simulated, is so great that perhaps I should credit him as to his belief.

It is shown to my satisfaction that his wife Emily and her father did not know of, or suspect, the insolvency of the firm at the advance of the \$20,000. His wife supposed he was wealthy and doing a good business. This is shown by her responsive answer and testimony, and confirmed by the fact that the complainants, Wheeler and Green, and other dealers who trusted them with millions, treated and dealt with them as responsible and wealthy. A young wife could not be supposed to suspect her husband in matters as to which she saw experts in business, not related by blood or affinity, trusting him with such amounts. There is no reason to doubt her testimony. That upon the failure, two-thirds of the advance, and, within a year after, the residue of it, was repaid by the wife to the firm from whom it was taken, is established and not disputed.

Wheeler and Green were creditors of the firm at the time the \$20,000 was advanced. The firm were their bankers; they deposited their moneys with them, and drew from them as needed. Their account was very active; the debt due to them from the firm at its failure was not the same debt as was due at the advance to Mrs. Kirtland. It may be that there was a time when their account was overdrawn, and the firm owed them nothing. But as at its failure, it owed them over \$40,-

000, as the dealing was continuous, and the over-draft, if any, accidental, I shall assume their rights to be the same as to this property, as if some indebtedness to them had continued from the advance to the failure.

The question then presented is this: If a man when insolvent or in debt, advances money as a gift to his wife or his son, they being at the time ignorant of the indebtedness or insolvency, and they purchase property or enter into business with this money, but afterwards, upon learning of the embarrassment of the donor, pay back in full the amount received, does this transaction impress the property purchased, or the profits of the business in which they engaged with such an indelible trust for creditors that at any distance of time afterwards the creditors can claim the property purchased and its advances, or the profits made in such business, both before and after refunding the advance?

I am of opinion that if the donee in such case receives the money in good faith, supposing that it was advanced by a perfectly solvent person, and that the gift could not injure his creditors, present and future, and was not intended for such purpose, and the amount is afterwards repaid in full to the source from which it was received, there is no fraud or other ground to infer or create a trust for future or even existing creditors, in the profits of the business or advance of the property after the money is returned, or even while it is kept in good faith. There is no privity or confidence between the donee and the creditor, or any other thing out of which a trust can arise. Fraud may create a trust; but here is in the donee neither actual nor legal fraud.

I have no doubt that a voluntary conveyance or gift of property, made at this time by Kirtland to his wife, even if received in perfect good faith, would have been void as against his creditors. If the gift had been in money she could have been compelled to repay it; but if it had been repaid or refunded before a creditor obtained a judgment or other lien, she could not again be compelled to pay it to the creditor, unless the payment was made so as to aid her husband in defrauding creditors. It is not necessary to decide whether if the money had not been repaid, the property purchased with it and held by the donee would be in trust for creditors beyond the amount of the advance.

The rights of creditors should be protected. No property of the debtor should be allowed to be conveyed away and held by a donee without consideration or in trust for the debtor. It should be followed into whosoever's hands it may be, except that of a bona fide purchaser for value, and given to the creditor. Beyond this the creditor has no right. And there are other persons who have rights to be protected as well as creditors. The wife or son of one who has been unfortunate or attempted to defraud, should not, to gratify a feeling of vindictiveness against a wrongdoer with whom they are so nearly connected, be stripped of what fairly belongs to them. When the creditor

has his three thousand ducats he must not seek for the penalty of the pound of flesh or for a single drop of blood.

There can be little doubt, from the great rise in its value since, that this property, in March, 1864, when it was conveyed, was worth more than \$25,000. At that time the depressing effect of the first years of the war was being relieved. The increase of money by the immense circulation of irredeemable legal tender notes had raised the money value of land by reducing the value of money, and if this property in 1860 was worth \$25,000, it was worth much more then. The price of \$5,000, charged by a father to a cherished daughter, was very likely, to his knowledge, below its value, and the conveyance intended as a favor to her. It would be gross injustice to take from that daughter, anxious and uniting with her father to preserve the home of her childhood, all the benefits, advantages, and profits of that purchase above the naked \$5,000, and hand them over to the creditors of her husband, to whom they never, in law, equity or right, belonged.

I know of no precedent for declaring the honest recipient of a temporary gift, fully returned, a trustee for the benefit of creditors. The only precedent I find for declaring such a trust is where the property was purchased by the husband himself, and the deed taken in the name of his wife—not for her benefit, but to be held in her name for the benefit of the husband to defraud his creditors.

A trust is held to result by operation of law, where one purchases land with his own money and takes the conveyance in the name of another; in such case the title is deemed to be in trust for him who advanced the money, for the presumption is that he intended to purchase for his own benefit. So where one employs an agent, and furnishes him with money to purchase land, and the agent purchases the land with this money, and takes the title in his own name, a trust results for the principal; but not if one employed as an agent purchases the land with his own money. But if one purchases land and takes the title in the name of his wife or child, it will be held to be a settlement on the wife, or an advancement to the child, unless it is shown to have been otherwise intended, and no trust will result. 2 Story's Eq. Jur. §§ 1201–1205; *Guthrie v. Gardner*, 19 Wend. (N. Y.) 414. But in such case, if the purchaser takes the deed in the name of his wife or child, for the purpose of defrauding or delaying creditors, and not for the purpose of making a settlement or advancement, a trust will result to the purchaser, and the land be liable to his debts.

In *Belford v. Crane*, 16 N. J. Eq. 265, 84 Am. Dec. 155, this doctrine was applied by Chancellor Green, and a trust was held to result for the husband, and the land held liable to his debts. But it is put by the Chancellor on the ground that the whole of the property of the husband was put in the name of his wife to place it beyond the reach of his creditors. He says: "The transfer was not made by deed of settlement. There was no declaration of a purpose by the husband to

appropriate a specific portion of his property for the use of his wife, but the property from time to time was purchased in the name of his wife, and a house subsequently erected thereon with the means of the husband." And in that case, as the Chancellor declared, every vestige of property that the husband owned was in the name of his wife; and it was held that "the land having been purchased with the money of the husband, there is a resulting trust in his favor." But the reason of the case shows that had the land been purchased with a specific sum set apart for a settlement upon the wife, the conclusion would have been different. The gift might have been declared void as against creditors, but no trust could have resulted.

In *Guthrie v. Gardner* the same doctrine was held and applied by Chief Justice Nelson. In that case the husband purchased and paid for the land and took the deed in the name of the wife, for the avowed purpose of keeping the property from his creditors; and the Chief Justice held that it was perfectly clear from the facts that the husband had no intent to make provision for his wife, and a resulting trust arose to the husband; that the fee thus passed to him and was subject to his debts.

But this is not a case of a purchase made by a husband in the name of his wife. It was a purchase made by the wife herself, of her father, of the family homestead for her own benefit; she herself made the bargain. I fully believe her testimony on this point. She got from her husband a large part of the purchase money which she paid for the conveyance. There is no authority for the creation of a resulting trust from such facts. When the person to whom the conveyance is made makes the bargain for the purchase for his own benefit, and obtains part, or even the whole of the purchase money from another, who knows that it is to be paid for a conveyance to the grantee for his own benefit, no resulting trust can arise. Else any stranger or banking institution that advances the money to make a purchase that turns out advantageous, might take the property and the profits of the purchase as *cestui que trust*. In this case the purchase was made by Mrs. Kirtland for her own benefit, and was understood to be made for that purpose by her father and her husband. The \$20,000 was advanced by her husband as a gift to her. There is no principle or authority on which this can be declared to create a resulting trust in him for the benefit of his creditors.

There is another principle that will prevent in this case a resulting trust. When the person to whom the conveyance is made pays part of the purchase money, no trust results to anyone who advances the residue, unless, in the language of Justice Hoar, in *McGowan v. McGowan*, "the part of the purchase money paid by him in whose favor the resulting trust is sought to be enforced, is shown to have been paid for some specific part or distinct interest in the estate—for some aliquot part, as it is sometimes expressed." He declares "that a general contribution of a sum of money toward the entire purchase money

is not sufficient." 14 Gray (Mass.) 119, 74 Am. Dec. 668. To the same effect are the decisions in *Crop v. Norton*, 2 Atk. 74; *White v. Carpenter*, 2 Paige (N. Y.) 240, and *Sayre v. Townsend*, 15 Wend. (N. Y.) 647. The doctrine is commented on and approved in *Browne on Frauds*, 86.

In this case there was no intention to purchase in fifths, nor was the advance intended to represent four-fifths or any other aliquot part of the estate; it was the intention of the father to convey the whole estate, upon the payment of \$20,000 in cash, and to charge her \$5,000 only on the advancement, even if the surplus of value was twice that sum.

For these reasons I am of opinion that no trust by reason of any fraud of Mrs. Kirtland, and no resulting trust, did arise or could arise, either for her husband or his creditors. And even if it was a case on which a resulting trust might have arisen, the fact that the whole amount advanced was returned by her to her husband, for his firm, from which the money was taken, and accepted by them four years before the complainants acquired any lien upon the property, and while the partners had full power to settle their own affairs, would have released the property from the trust. If she had given a mortgage to the firm for this \$20,000, payment in 1864 and 1865, if made without fraud, would have discharged it, even although the partners had squandered the money and not applied it to the payment of debts.

In this case the great increase of value has accrued since the \$20,000 was refunded and accepted, and it would be gross injustice to declare that creditors of her husband were entitled to this, if the doctrine of trusts had required it.

The view I have taken of this question being on the assumption that Wheeler and Green were creditors at the time of the advance of the \$20,000, and that they continued such until the failure, relieves me from the investigation of the accounts and examinations of the piles of firm ledgers, and accounts exhibited and produced to show that the debt to them at the time of the advance was paid off and discharged long before the failure, and that no part of their present claim is for any debt then existing, and that about the 1st of July, 1864, the firm for a period of some days owed them nothing—questions not without doubt; and also from discussing and applying the question of law, whether an advance made to a wife or child can be questioned by a subsequent creditor, if all debts existing at the time of the advancement had been paid and settled, and there is no actual intent by the advancement to defraud subsequent creditors.

The bill against Emily G. Kirtland and others must be dismissed.

* * *

TRUEDELL v. BOURKE.

(Supreme Court of New York, Appellate Division, Fourth Department, 1898.
29 App. Div. 95, 51 N. Y. Supp. 409.)

Appeal by the plaintiff, John W. Truesdell, as administrator, etc., of John Fitzgerald, deceased, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the Clerk of the County of Onondaga, on the 27th day of February, 1896, upon the dismissal of the complaint by direction of the court, after a trial at the Onondaga Trial Term, with notice of an intention to bring up for review upon such appeal an order bearing date the 26th day of February, 1896, dismissing the complaint.

This action was begun March 28, 1885, to recover \$1,000, with interest from March, 1882, alleged to have been fraudulently transferred by the plaintiff's intestate to Kate Fitzgerald to defraud his creditors, and by her transferred, with like intent, to William J. Bourke. Plaintiff's intestate died February 28, 1882, hopelessly insolvent. April 15, 1887, William J. Bourke died leaving a last will and testament, which was duly probated, and letters testamentary issued thereon to Hannie L. Bourke, who was substituted as the defendant herein. In January, 1893, a trial was held, and a verdict directed for the plaintiff, a judgment entered thereon, which was reversed, and a new trial granted, on the ground that there was a question of fact for the jury. 69 Hun, 613, 25 N. Y. Supp. 1130. In 1894 a second trial was held, which resulted in a verdict for \$1,000, with interest from May 28, 1885, a judgment was entered thereon, which was affirmed (80 Hun, 55, 29 N. Y. Supp. 849), but was reversed by the Court of Appeals and a new trial granted. 145 N. Y. 612, 40 N. E. 83. The third trial occurred in February, 1896, and, at the close of the plaintiff's evidence, the court dismissed the complaint, and from the judgment entered on the dismissal this appeal is taken.

FOLLETT, J. This action was begun pursuant to Chapter 314 of the Laws of 1858, which provides that an administrator of an insolvent estate may treat as void all transfers made by the intestate in fraud of the rights of creditors, and authorizes the administrator to maintain actions for the recovery of property so transferred. That the estate of John Fitzgerald was largely insolvent, and had been for some time preceding his death, is an undisputed fact.

It has always been the rule that a creditor of an insolvent decedent might maintain an action to set aside as fraudulent a voluntary conveyance or transfer made in the lifetime of the decedent. *Frazer v. Western*, 1 Barb. Ch. 220, affirmed How. Ct. App. Cas. 448; *Loomis v. Tift*, 16 Barb. 541; *Estes v. Wilcox*, 67 N. Y. 264. The statute above referred to has made no change in the law, except it confers the right upon the representative to recover property fraudulently transferred by his insolvent intestate for the benefit of all the creditors, which right did not exist previous to the statute. William J. Bourke

testified in his lifetime that the \$1,000 were given him for the benefit of the Church of St. John the Baptist for the Sacred Heart School. The transfer being voluntary, and the intestate insolvent when it was made, and remaining so until his death, it is immaterial whether William J. Bourke knew that the intestate was insolvent or not, provided he had not transferred the money to the Church or School without notice and in good faith.

In case a person makes a voluntary conveyance or transfer of his property, and is insolvent at the time, such voluntary conveyance or transfer is fraudulent as against his creditors, even though the transferee was without knowledge or notice that the transferer was insolvent. *Mohawk Bank v. Atwater*, 2 Paige, 54; *Smart v. Harring*, 52 How. Prac. 505; *Salomon v. Moral*, 53 How. Prac. 342; *Emmerich v. Hefferan*, 26 J. & S. 217. If an insolvent debtor makes a voluntary conveyance or transfer of his property, real or personal, and that fact be clearly established, the inference is inevitable that the conveyance is fraudulent as against creditors. *Coleman v. Burr*, 93 N. Y. 17, 45 Am. Rep. 160. It being undisputed that John Fitzgerald was insolvent at the time when the \$1,000 were given to William J. Bourke, it follows, as a matter of law, that as against the creditors of the former the gift or transfer was fraudulent in law and invalid. See cases above cited, and *Wait, Fr. Conv. § 208*; *Bump, Fr. Conv. 276*, and cases cited. This species of fraud is treated of in works on equity jurisprudence, under the head of constructive fraud and voluntary conveyances and transfers, and the rule of law herein declared has never, so far as I am aware, been questioned.

The important question is, was the evidence given on this trial sufficient to raise a question of fact for the jury, whether William J. Bourke, before he transferred the gift to the church or school, if he ever did, had knowledge or notice that the intestate was insolvent when the gift was made?

William J. Bourke was a Catholic priest, and pastor of the Church of St. John the Baptist, at Syracuse, N. Y., which maintained a school known as Sacred Heart. At the death of John Fitzgerald, and for some time before, his money, amounting to more than \$3,000, had been kept on deposit with the Trust and Deposit Company of Onondaga in the name of "Kate Fitzgerald," on whose passbook was written "John Fitzgerald may draw." March 14, 1882, fourteen days after the death of John Fitzgerald, Kate Fitzgerald drew the balance of this account, amounting to \$3,520.41, and on the same day the State Bank of Syracuse drew a draft on the First National Bank of New York for \$1,000 payable to the order of Kate Fitzgerald, which was endorsed by her to William J. Bourke, and it also bore the following restrictive endorsement: "Pay Union Trust Co. for collection on account Syracuse Savings Bank." On the same day, March 14, 1882, \$1,000 were credited to the account of "Rev. Wm. J. or Hannie L. Bourke" with the Syracuse Savings Bank.

Hannie L. Bourke was a sister of William J. Bourke and is now the executrix of his estate. In 1882 there was an account in the Syracuse Savings Bank kept in the name of "Rev. Wm. J. or Hannie L. Bourke." In the same year the Syracuse Savings Bank held a mortgage on the property of the Church of St. John the Baptist, on which William J. Bourke paid, July 8, 1882, \$1,000 by a check drawn on the Salt Springs Bank, as testified by Reidel, an employee of the Syracuse Savings Bank, and he also testified that there was no withdrawal on that day from the account of "Rev. Wm. J. or Hannie L. Bourke." This account is in evidence, and there were no withdrawals therefrom during 1882, except two items of \$100 each, one item of \$150, and another item of \$200. So it is apparently established that the \$1,000 paid on the mortgage came not from the account into which the \$1,000 belonging to the estate of the intestate was traced, but from some other source.

April 11, 1882, John W. Truesdell was appointed administrator of the estate of John Fitzgerald. George K. Collins, an attorney, testified that within a week, he thinks, after Truesdell's appointment the claim against Bourke was placed in his hands, and he wrote him requesting an interview, that Bourke came to his office and he told Bourke that the estate had a claim of \$1,000 or \$1,100 which he would better pay, as to keep it back would injure him. He told Bourke that he understood that he claimed the sum as a gift, but that it was not good. He testified that Bourke did not admit that he had received the money, but said it would be time enough to give it up when it was shown that he had it. James Keefe testified that he had a conversation with William J. Bourke about five or six months after the death of John Fitzgerald, which would be in July or August, 1882, in which Bourke said: "He said he had the thousand dollars that came from John Fitzgerald, and he spoke one time that he thought he could secure a judgment from George Porter. That it was a question whether he could keep this money or not, and he understood that George Porter had a judgment that he could secure for nothing as an offset against this thousand dollars."

October 2, 1882, William J. Bourke was examined in the Surrogate's Court of the County of Onondaga, and testified: "John Fitzgerald gave me one thousand dollars in charity for a school; he gave it me about one year ago. I got this money after his death; I got the money through the hands of Kate Fitzgerald; I deposited the money or check in the Syracuse Savings Bank in my own name. It was just one thousand dollars. I had no papers or writing in respect to this money from John Fitzgerald. I knew he left one thousand dollars for me as agent of the church. I asked Kate Fitzgerald for this thousand dollars. She said John Fitzgerald had spoken to her about it and left it with her for me as treasurer of the church, that John Fitzgerald had left for that purpose. * * * I paid this one thousand dollars to the Syracuse Savings Bank on a mortgage the Bank

held against St. John the Baptist Church, of which I am the pastor.”

April 15, 1887, about two years after this action was begun, and before the first trial, William J. Bourke made his last will and testament, which after his death was duly probated. The following is a copy of the 4th clause of his will:

“Fourth. There is also deposited in the Syracuse Savings Bank the sum of one thousand dollars which belonged to the Sacred Heart School under the supervision of the Sisters of St. Joseph, unless a judgment is rendered against me or my estate in the action pending in favor of John W. Truesdell, as administrator of the goods, chattels, and credits of John Fitzgerald, in which event I direct said money to be applied in satisfaction of said judgment.”

The evidence referred to is quite sufficient to raise an issue of fact for the jury whether William J. Bourke had notice when he paid the money over for the benefit of the Church, if he ever did, that the donor was insolvent and that the money was claimed by his administrator.

The rule is elementary that in case an innocent transferee, acting as trustee, of money transferred in fraud of creditors, pays it over before notice of the fraudulent character of the transfer, according to the terms of the transfer, he is not liable, but in case he pays it over according to the terms of the transfer, after notice of the fraudulent character of the transfer, he is liable in an action brought for the benefit of creditors. Bump, Fr. Conv. (2d Ed.) c. 24, and cases cited.

It should be stated that the evidence contained in this record in respect to notice is quite different from the evidence contained in the record reviewed by the Court of Appeals.

The view taken of this case renders it unnecessary to consider the exceptions to the rulings on the admission or rejection of evidence which have been argued.

The judgment should be reversed and a new trial granted, with costs to the appellant to abide the event.

In case the jury finds the following propositions the plaintiff will be entitled to recover: (1) That the intestate or his estate was insolvent when the gift was made. (2) That William J. Bourke had not paid over to the church or school the money given him when this action was begun. Or in case the jury finds the first proposition above stated and finds that William J. Bourke paid the money to the church or school before this action was begun, but with knowledge or notice that the intestate's estate was insolvent, then the plaintiff will be entitled to recover.

All concurred.

Judgment reversed and a new trial ordered, with costs to the appellant to abide the event.

GEORGE DIXON, Jr., v. JUDSON W. CALDWELL.

(Supreme Court of Ohio, 1864. 15 Ohio St. 412, 86 Am. Dec. 487.)

Error to the District Court of Ross County.

The defendant in error, Caldwell, was the owner of a military bounty land warrant, No. 31,694, for 160 acres, issued to him by the government of the United States, under the act of congress of February 11, 1847; and shortly after he received the same, it was fraudulently obtained from him, and replaced by a spurious or forged warrant, which, for a long time, he supposed genuine.

Without the knowledge or consent of Caldwell, the general warrant was sold and assigned to George Dixon, Jr., the plaintiff in error, by some person representing Caldwell, and who forged his name thereto.

Dixon, being ignorant of the fraudulent manner in which the warrant had been obtained, and alike ignorant of the forged assignment thereof, on the seventh day of February, 1849, purchased the warrant, and paid therefor one hundred and thirty dollars, believing the assignment to be the genuine assignment of Caldwell, and that, by his purchase, he was acquiring full and complete title to the warrant.

Having thus in good faith acquired, as he supposed, the warrant, Dixon, without any notice of the fraudulent manner in which it had been obtained, or of the forgery, located the same upon the land described in the petition, and obtained a patent therefor before the commencement of the original suit.

Upon this state of fact Caldwell sought to charge Dixon, as his trustee, for the land so located; and, in his petition, prayed for a conveyance of the portion of the lands remaining unsold; for an account of the proceeds of the part which had been sold, and for a judgment against Dixon for the amount found, with interest; also for an account of the rents and profits.

In the court of common pleas Dixon was adjudged to be a trustee of the plaintiff for the lands; and the relief prayed for was granted.

This judgment was, on error, affirmed by the district court, and to revise this judgment of affirmance is the object of the present petition in error.

WHITE, J. The distinction between legal and equitable rights exists in the subjects to which they relate, and is not affected by the form or mode of procedure that may be prescribed for their enforcement. The code abolished the distinction between actions at law and suits in equity, and substituted in their place one form of action; yet, the rights and liabilities of parties, legal and equitable, as distinguished from the mode of procedure, remain the same since, as before, the adoption of the code. Dixon, the defendant below, is the legal owner of the land in controversy, as patentee. This is conceded by Caldwell, the plaintiff below, but he claims to be the equitable owner, and that

Dixon is his trustee, and as such, in equity, bound to account for the proceeds of the portion of the land sold, and surrender the remainder.

There is no pretense of an express trust; nor is it claimed that the defendant acquired the property by fraud or by other unfair means. The property, therefore, having been fairly acquired, before a constructive trust can be raised in equity, and fastened upon the defendant, so as to convert him into a trustee for the plaintiff, the circumstances of the transaction must appear to be such that it would be violating some principle of equity, to allow the defendant to retain the legal title to the land for his own benefit.

The controversy here is not solely in regard to the land warrant. The legal title to that was clearly vested in the plaintiff, and for its conversion he has a plain legal remedy against the defendant for its value; and, before it was lost in entering the land, for its recovery in specie.

The question is, whether, in the light of equity, the measure of legal relief is to be regarded as inadequate; and the defendant required, by a court of equity, to surrender the land to which he acquired the legal title in good faith, and, as he supposed, for his own benefit, by the combined use of the warrant and his own means, industry and enterprise.

The defendant claims to be a bona fide purchaser of the land in controversy, for value, without notice of the plaintiff's rights; and relies for his defense upon the rules of equity for the protection of such purchasers.

The land warrant in question was assignable in law, was in the possession and apparent ownership of the vendor, and the assignment was regular in form. The defect in the vendor's title was not apparent, and there was no reasonable ground for suspicion that the assignment had been forged. The defendant purchased and paid full value for the warrant, and is not chargeable with a want of reasonable diligence in so doing. Having no reason to suspect the existence of plaintiff's title to the warrant, he was in equity and good conscience, chargeable with no duty toward him in relation to its future use. If he withheld it from entry he would have been liable to return it to the plaintiff, or pay him its value. The good faith of his purchase would have been no answer to the plaintiff's legal demand. After the location of the warrant, the holder of the legal title thereof acquired an equity in the land upon which the location was made; and before the defendant clothed himself with the legal title, and while the equities were open between the parties, Caldwell's equity, being older in time, would have been better in right. But Dixon, unaffected with fraud or notice, and upon a valuable consideration paid, having obtained the legal title to the land in controversy, brings himself within the protection awarded in equity to the holder of the legal title.

A court of equity, says Sugden in his *Treatise on Vendors* (vol. 3, side p. 417), acts upon the conscience, and as it is impossible to attach

any demand upon the conscience of a man who has purchased for a valuable consideration, bona fide, and without any notice of any claim on the estate, such a man is entitled to the peculiar favor and protection of a court of equity.

Where a court of equity cannot deal directly with the thing which is the subject matter in controversy, but has to reach it through the consciences of the parties, its jurisdiction is necessarily limited to enforcing the fulfillment of their equitable obligations, and cannot extend to compelling the relinquishment of any right or the abandonment of any interest which can be retained consistently with equity and with conscience.

This principle applies especially where the aid of a court of chancery is sought to enforce the surrender of an estate in land. As in such case, the court can only act on the land, through the medium of the parties, it must first inquire whether the party against whom its assistance is sought, is conscientiously bound to comply with the demand urged against him, for if he is not, the case may fall without the scope of a jurisdiction which is founded upon the obligations of conscience. See notes of the American Editor to *Bassett v. Nosworthy*, 2 Lead. Cas. in Eq. pp. 67, 68, and the authorities there cited. *Mitford's Eq. Plead.* side p. 135; *Cottrell v. Hughes*, 29 Eng. L. & Eq. R. 358; s. c., 80 Eng. C. L. R. 556; *Wallwyn v. Lee*, 9 Ves. Jr. side p. 25; *Gibler et al. v. Trimble*, 14 Ohio, 340.

In *Jones v. Powles*, 3 Myl. & Keen, 581, the equitable title of the purchaser who had got in the legal estate, depended upon a forged will, and he was held entitled to the protection of the court. In this case a person advanced money upon the mortgage of an estate, which the mortgagor claimed under a will, which ultimately turned out to be forged, and got a conveyance of the legal estate, which was outstanding in a mortgagee whose debt had been satisfied. On a bill filed by the heiress-at-law, it was held by Sir John Leach, M. R., that the mortgagee, being a purchaser without notice of the plaintiff's title, could protect herself by the legal estate. The court observed, that its impression at the opening of the case was, that the protection of the legal estate extended only to cases where the title of the purchaser for valuable consideration without notice, was impeached by reason of some secret act or matter done by the vendor or those under whom he claimed; but upon full consideration of all the authorities and dicta of judges and text writers, and the principles upon which the rule is grounded, the court was of opinion that the protection of the legal estate was to be extended not merely to cases in which the title of the purchaser for valuable consideration without notice is impeached by reason of some secret act done, but also to cases in which it is impeached by reason of the falsehood of a fact of title asserted by the vendor, or those under whom he claims, where such asserted title is clothed with possession, and the falsehood of the fact asserted could not have been detected by reasonable diligence. 2 Lead. Cas. in Eq.

side page 7. This case is approved by Mr. Sugden in his *Treatise* already cited, page 417, and is founded upon clear principles of equity; although they would not, here, be applicable to the case of a satisfied mortgage.

It is not deemed necessary to examine in detail, in this opinion, the authorities relied upon by the counsel of the defendant in error. Where the benefit of the rule has been denied, the party was found to be affected with notice; and, as we have already stated, it is indispensable for the party holding the legal title, and seeking protection in equity, to show that he is a purchaser for a valuable consideration; that his purchase was in all respects fair, and free from every kind of fraud; and that at the time of his purchase he was not chargeable with notice of the adverse claim.

The conclusion, therefore, at which we have arrived, is, that Dixon cannot be required to surrender the legal title of the unsold land to the plaintiff below, nor to account for the proceeds of the part sold; and that the court erred in requiring him to do so. But, as before stated, he is under a clear legal liability for the value of the warrant. The judgment of the district court and of the court of common pleas, is therefore reversed and the cause remanded to the common pleas for further proceedings.

BRINKERHOFF, C. J., and SCOTT, DAY and WELCH, JJ., concurred.

In re HALLETT'S ESTATE.

KNATCHBULL v. HALLETT.

(Court of Appeal, 1880. Law Reports, 13 Chancery Division, 696.)

Sir GEORGE JESSEL, Master of the Rolls.¹⁶ This is an appeal from a decision of Mr. Justice Fry, and the singularity of the appeal is, that it is an appeal in favor of Mr. Justice Fry's opinion and against his decision; the explanation of that being, that the learned Judge conceived himself bound by some decisions of the Appeal Court to decide against his own opinion; and I am far from saying that I dissent from it on either point—either on principle as to how he thought the case ought to be decided, or on the question whether a Judge in his position as a Judge of first instance, could very well have decided otherwise.

The question we have to consider depends on very few facts. I will first state all those which I think material, or on which it appears to me my judgment ought to be based. A Mr. Hallett, a solicitor, was a trustee of some bonds. Without authority and improperly he sold them, and on the 14th of November, 1877, by his direction the proceeds of these bonds were paid to his credit at Messrs. Twinings' Bank,

¹⁶ The statement of facts and the concurring opinion of Baggallay, L. J., and the dissenting opinion of Thesiger, L. J., are omitted.

and there mixed with moneys belonging to himself, to the credit of the same banking account, and he also drew out by ordinary check moneys from the banking account, which he used for his own purposes. He died in February, 1878, and at his death the account stood in this way; that there was more money to the credit of the account than the sum of trust money paid into it; but if you applied every payment made after November, 1877, to the first items on the credit side in order of date, a large portion of the trust money would have been paid out. The question really is, whether or not, under these circumstances, the beneficiaries—that is, the persons entitled to the trust moneys, who are the present appellants,—are or are not entitled to say that the moneys subsequently drawn out—that is, drawn out by Mr. Hallett subsequently to November 1877—and applied for his own use, are to be treated as appropriated to the repayment of his own moneys, or whether the respondents, the executors, are right in their contention that they are to be treated as appropriated in the way I have mentioned, so as to diminish the amount now applicable to the repayment of the trust funds.

I will first of all consider the case on principle, and then I will consider how far we are bound by authority to come to a decision opposed to principle. It may well be, and sometimes does so happen, that we are bound to come to a decision opposed to principle. Now, first upon principle, nothing can be better settled, either in our own law, or, I suppose, the law of all civilized countries, than this, that where a man does an act which may be rightfully performed, he cannot say that that act was intentionally and in fact done wrongfully. A man who has a right of entry cannot say that he committed a trespass in entering. A man who sells the goods of another as agent for the owner cannot prevent the owner adopting the sale, and deny that he acted as agent for the owner. It runs throughout our law, and we are familiar with numerous instances in the law of real property. A man who grants a lease believing he has sufficient estate to grant it, although it turns out that he has not, but has a power which enables him to grant it, is not allowed to say he did not grant it under the power. Wherever it can be done rightfully, he is not allowed to say, against the person entitled to the property or the right, that he has done it wrongfully. That is the universal law.

When we come to apply that principle to the case of a trustee who has blended trust moneys with his own, it seems to me perfectly plain that he cannot be heard to say that he took away the trust money when he had a right to take away his own money. The simplest case put is the mingling of trust moneys in a bag with money of the trustee's own. Suppose he has a hundred sovereigns in a bag, and he adds to them another hundred sovereigns of his own, so that they are commingled in such a way that they cannot be distinguished, and the next day he draws out for his own purposes £100., is it tolerable for anybody to allege that what he drew out was the first £100., the trust

money, and that he misapplied it, and left his own £100. in the bag? It is obvious he must have taken away that which he had a right to take away, his own £100. What difference does it make if, instead of being in a bag, he deposits it with his banker, and then pays in money of his own, and draws out some money for his own purposes? Could he say that he had actually drawn out anything but his own money? His money was there, and he had a right to draw it out, and why should the natural act of simply drawing out the money be attributed to anything except to his ownership of money which was at his bankers.

It is said, no doubt, that according to the modern theory of banking, the deposit banker is a debtor for the money. So he is, and not a trustee in the strict sense of the word. At the same time one must recollect that the position of a deposit banker is different from that of an ordinary debtor. Still he is for some purposes a debtor, and it is said that if a debt of this kind is paid by a banker, although the total balance is the amount owing by the banker, yet considering the repayments and the sums paid in by the depositor, you attribute the first sum drawn out to the first sum paid in. That was a rule first established by Sir William Grant in *Clayton's Case*, 1 Mer. 572; a very convenient rule, and I have nothing to say against it unless there is evidence either of agreement to the contrary or of circumstances from which a contrary intention must be presumed, and then of course that which is a mere presumption of law gives way to other considerations. Therefore, it does appear to me there is nothing in the world laid down by Sir William Grant in *Clayton's Case*, or in the numerous cases which follow it, which in the slightest degree affects the principle, which I consider to be clearly established.

Then I come to the great difficulty in the case, the difficulty which, as I shall show from an extract or two from Mr. Justice Fry's judgment, weighed with him. What he says is this: "If the matter were unfettered by authority, it would appear to me clear that where a man has a balance to his credit consisting in part of funds which are his own, and which he may legally draw out and apply for his own purposes, and in part of trust funds which he cannot lawfully draw out and apply for his own purposes, his drawings for his own purposes ought to be attributed to his own funds and not to the trust funds. But it appears to me I am not at liberty, in the existing state of the authorities, to act according to the inclination of my own mind;" and then he refers to *Pennell v. Deffell*, 4 D., M. & G. 372, and one or two cases that have followed it. In a second judgment in the same case, Mr. Justice Fry says this: "I have already expressed the opinion I should have been inclined to act on if I had been at liberty, but I am not at liberty." So it is plain that, as far as Mr. Justice Fry was concerned, he would have decided otherwise if he had not been fettered by authority.

Now, the only authority worth considering for this purpose is that of *Pennell v. Deffell* itself. I will, in a moment, say a word about the

subsequent decisions. First of all *Pennell v. Deffell*, I must remember, is the decision of a court of co-ordinate jurisdiction with this Court, namely, the Court of Appeal in Chancery, and was decided several years ago. But, on the other hand, we must remember that the law as contained or laid down in the decision or judgment which guides a future Judge or another Judge in applying it, is simply the expression of principle which is to be ascertained from the judgment. No doubt a part of the decision in *Pennell v. Deffell* was exactly this case, and the court applied the law, as correctly stated by Mr. Justice Fry, by applying *Clayton's Case* even to such a case as this, and to that extent destroyed the claim of the cestui que trust. But that was not the whole case of *Pennell v. Deffell*. The main part of *Pennell v. Deffell* was giving effect to the right of cestuis que trust in the case of blended trust moneys, and upon the very principle which I have endeavored to explain, and which, if I may say so, was so clearly explained by Mr. Justice Fry in his judgment. If, therefore, we are to ascertain the principle on which *Pennell v. Deffell* is decided, we must look at the whole of the judgment, and not at part of it only. That being so, I have come to this conclusion, that the principle is rightly laid down, and it is rightly applied throughout the judgment except as to this portion, and that as to this portion of the case there has been a mistake, not in the principle, but in the application of the principle. Therefore, if I am to be guided by the principle as laid down, I think the principle must prevail without regard to a mere slip in its application.

But it will be said that this part of *Pennell v. Deffell* has been followed in subsequent cases. So it has. As regards subsequent cases in the inferior courts, we need not trouble ourselves with them. Judges of first instance would not have overruled the mistaken application of principle. As regards the Court of Appeal, it seems to have been followed certainly in one, if not in two cases, without question; but although there are cases in our law where erroneous decisions, not reconcilable even with the judgment on which the decision proceeded, have created a rule of conduct, and as to which, after the lapse of years, Judges have not felt themselves at liberty to review the decision even by the light of the judgment on which the first decision was pronounced, yet no such considerations apply to this case. No human being ever gave credit to a man on the theory that he would misappropriate trust money, and thereby increase his assets. No human being ever gave credit, even beyond that theory, that he should not only misappropriate trust moneys to increase his assets, but that he should pay the trust moneys so misappropriated to his own banking account with his own moneys, and draw out after that a larger sum than the first sums paid in for the trust moneys. It never could have been made a rule of conduct, or have affected the transactions of mankind, and therefore it does not come within the line of cases which, having established a rule of conduct, no Judge could interfere with. It appears to me we should not be deferring to authority but

making a misuse of authority, which is to declare the law, if by reason of this, which appears to me a mere slip in the case of *Pennell v. Deffell*, and which, it must be recollected was a very small portion of the contest in that case, we were to consider ourselves bound to decide against what is the settled principle.

Therefore, in my opinion, the appeal must be allowed.

MERCANTILE TRUST CO. v. ST. LOUIS & S. F. RY. CO.

(Circuit Court, D. Missouri, E. D., 1900. 99 Fed. 485.)

In the matter of the intervening petition of A. L. Wolff, Receiver of the Kansas Midland Railway Company.

ADAMS, District Judge. In the year 1888 the Kansas Midland Railway Company delivered certain of its bonds to the St. Louis & San Francisco Railway Company in trust to sell the same, and apply the proceeds of the sale in the equipment and improvement of the railroad of the Kansas Midland Railway Company. The St. Louis & San Francisco Railway Company (hereafter called the "Frisco Company") sold the bonds, realized therefor \$367,586.50, and expended in the due execution of the trust \$324,554.82, leaving a balance of \$43,031.68, unaccounted for. On receipt of the proceeds of the sale of the bonds in 1888, the Frisco Company deposited the same in a general account kept by it, together with other moneys, and thereafter, from time to time, deposited in that account its current and other receipts, and drew out, as occasion required, money for the equipment and improvement of the road of the Kansas Midland Railway Company, as well as for the payment of its other and personal obligations. The balance to the credit of the Frisco Company in this general account varied from time to time according to the deposits in, and checks against, the account; at all times, however, up to December 23, 1893, showing some balance on hand. On November 15, 1890, the balance amounted to \$2,265.55. This remained unchanged from November 15 to December 12, 1890, after which further deposits were from time to time made, resulting in fluctuating balances until December 23, 1893, the date of the appointment of the receiver for said Frisco Company, when it stood at \$36,522.28. This last mentioned sum came into the possession of the receiver. It appears that the St. Louis & San Francisco Railroad Company, or the "New Frisco Company," as it is called, which became the purchaser of all the property of the old Frisco Company at a sale under a decree of foreclosure in the main case, took its rights under and subject to the provisions of the decree, requiring it to pay, among other things, all liabilities incurred by the old Frisco Company, which were prior in lien to the consolidated mortgage under which the foreclosure was had. The special master to whom this intervention

was referred reports that the balance which came into the hands of the receiver, namely \$36,522.28, was subject to the original trust in favor of the Kansas Midland Railway Company, and should be now paid to the intervener, who is the duly appointed receiver of the Kansas Midland Railway Company, by the New Frisco Company, under the provisions of the decree of foreclosure in the main case.

Numerous exceptions are taken to the report of the special master, but two of them only were seriously argued, and involve all that is necessary for a final disposition of the case. The first is that the special master erred in holding that the Old Frisco Company ever became a trustee with respect to the bonds in question, or ever became subject to the equitable doctrine governing trustees, but became a simple debtor to the Kansas Midland Railway Company for any unexpended balance of the money received by it as proceeds of the sale of the bonds in question. The second is that the special master erred in subjecting all the balance found to the credit of the Old Frisco Company in its depositories at the time the receiver was appointed for that Company, to the satisfaction of the intervener's claim.

As to the first of these two questions, I am entirely satisfied with the conclusion reached by the special master, and will content myself by the statement that the documentary proof in the case clearly creates the relation of trustee and cestui que trust between the Old Frisco Company and the Kansas Midland Railway Company with respect to the proceeds of the bonds in question, and that as a result the defendant, as successor of the Old Frisco Company, under and by virtue of the decree of foreclosure in this case, must be held to an account on the theory of an original trust in the Old Frisco Company; so far as the principles of equity applicable to the facts of the case will permit.

The second exception raises the question whether, under the facts as already stated, the trust and obligation of the Old Frisco Company attached to the entire \$36,522.28 turned over to the receiver, or only to the \$2,265.55, which is the minimum balance at any one time of all the funds with which the trust fund was commingled. Counsel have called attention to a large number of cases, both state and federal, in which the doctrine applicable to this case has been discussed; and, while there is some diversity of opinion found in the cases, I have reached the conclusion that the weight of authority, as well as reason, conduces to the result that the intervener's right to recover the trust fund in question must depend upon his ability to trace it, or the fund with which it was commingled, into the hands of the receiver of the Old Frisco Company. It is now the settled doctrine that commingling a trust fund with the private funds of the trustee does not destroy the right of the cestui que trust to follow it. The commingling being wrong, the entire fund is impressed with the trust; and, as long as an amount equal to the trust fund remains in the commingled mass, the same and all of it, to the extent of the trust fund, will be made to respond to the claim of the cestui que trust. This last mentioned rule

is in perfect correspondence with the rule first announced, requiring a cestui que trust to show that his money or property is in the hands of the trustee. It simply enlarges the rule, and allows recovery when and so far as the commingled fund in which the trust fund has been inexplicably confused is found in the hands of the trustee. The foregoing propositions I believe to be fully supported by the authorities, and they are well set forth in the able opinion of Judge Philips, in the case of *Metropolitan Nat. Bank of Kansas City v. Campbell Commission Co.* (C. C.) 77 Fed. 705. A large number of cases are referred to and commented upon in this last mentioned case, supporting the conclusion reached. There is another line of authority announcing the proposition that because a trust fund, when appropriated by a trustee to his own use, swells his assets, the general estate of the trustee, when insolvency supervenes, will be impressed with a trust for the reimbursement of the cestui que trust, on the ground that such estate has been benefited to an equal amount by the trustee's breach of duty. But this rule, as I understand, has not received the sanction of any federal court, and of but few state courts. The equity, or, rather, want of equity of such a rule is well characterized by the court of appeals of New York in the case of *Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504, in which it is said: "We think this is quite too vague an equity for judicial cognizance, and we find no case justifying relief upon such a circumstance. In a very general sense, all creditors of an insolvent may be presumed to have contributed to the assets which constitute the residuum of his estate."

So it seems to me. If the fact that the money or property transferred to the trustee has so increased his assets as, in and of itself, to entitle the creditor to a preference, why will not all general creditors be entitled to the same preference? The consideration of their debts has at some time enhanced the funds or estate of the debtor. Following the well settled rule already stated, that the entire account with which trust funds have been commingled may be appropriated for the satisfaction of the trust, and giving the intervener the full benefit of that rule, I am of opinion that the minimum amount found at any one time in the account of the Frisco Company must be the maximum amount of the trust fund which by any possibility can be traced into the receiver's hands. Between November 15 and December 12, 1890, this minimum amount stood at \$2,265.55. This may possibly have included a part of the original trust funds. At any rate, it is the remnant of the fund with which it was originally commingled. All the trust fund, excepting this remnant, had been before November 15, 1890, dissipated or appropriated to the trustee's own use. The identification of the original trust fund is here lost, as to all thereof except the remnant of \$2,265.55; and certain it is that no part of the original trust fund can be traced into any of the deposits clearly shown to have been made by the Frisco Company after December 12, 1890. It was conceded at the argument that if in November, 1890, the whole account had been

drawn out by the Frisco Company, so that nothing remained, the tracing or identification of the trust fund would no longer have been possible, and that no subsequent deposits would have been subject to the original trust. This concession was manifestly made on the ground that no part of the original trust fund could be said to be mingled with that which was subsequently deposited. If that argument is sound—and I think it is—the same conclusion should follow as to all funds subsequently deposited over and above the small remnant then on hand—(for it is clear that all trace of the trust fund was lost, except as to that remnant), and that this remnant represented the full amount of which, by any possibility, the original trust fund could then have formed a part. It follows that the intervener has failed to prove that any of the money of the Kansas Midland Railway Company, either in its original or commingled form, came into the hands of the receiver of the Frisco Company beyond the sum of \$2,265.55, and that all trace or identification of the balance of the original trust fund is impossible. All the exceptions to the report of the special master, made by both parties, other than those relating to the amount of recovery, will therefore be overruled, and the exception of the defendant to such parts of the report as relate to the amount of recovery will be sustained; and, the case, now being submitted to the court, a decree will be entered requiring the defendant, the St. Louis & San Francisco Railroad Company, to pay to the intervener the sum of \$2,265.55, with interest thereon from May 15, 1897, the date of filing the intervening petition herein, to the present time, at the rate of 6 per cent. per annum.

MASSEY et al. v. FISHER.

(Circuit Court, E. D. Pennsylvania, 1894. 62 Fed. 958.)

Suit by J. R. Massey & Son against Benjamin F. Fisher, Receiver of the Spring Garden National Bank. Decree for complainants.

BUTLER, District Judge.¹⁷ There is no controversy about the facts; and the plaintiff's statement may therefore be adopted:

"On February 3, 1891, J. R. Massey & Son, who were depositors with the Spring Garden National Bank, indorsed and had discounted by the Bank a note, dated February 2, 1891, made by Samuel Young to the order of Ephraim Young for \$1,225, at four months, which had been indorsed by the payee and by one Edward Phair. This note fell due June 5, 1891. On February 17, 1891, the Spring Garden National Bank deposited the note with the clearing-house committee of the clearing-house association of the banks of Philadelphia in substitution for some other notes then matured or about to mature, which had theretofore been pledged to secure advances made to the bank by that com-

¹⁷ A part of the opinion is omitted.

mittee. On April 30, 1891, Frank H. Massey, one of the complainants, being ignorant that the bank no longer held the Young note, called at the office of the bank and stated to the cashier that he desired to pay it. The cashier sent a clerk to fetch the note, but the latter returned without it and informed him that it had been delivered to the clearing-house committee. The cashier then said to Mr. Massey: 'You pay me the money, and the next time we send to the clearing house we will take up this Young note and send it to you.' Massey thereupon gave the cashier \$1,225, in bank bills, and was handed a receipt for them in the following form:

"The Spring Garden National Bank,

"12th and Spring Garden Streets.

"Philadelphia, Apr. 30, 1891.

"Received of J. R. Massey & Son twelve hundred and twenty-five (\$1225) dollars, being in full payment of note signed Edward Phair for that amount, due June 5-91, said note to be handed Messrs. Massey upon the return of this receipt.

"[Signed]

H. H. Kennedy, Cash.'

"The money thus received by the cashier was handed by him to the note clerk of the bank, and he, on the same day, transferred it to the receiving teller, by whom it was put into the drawer with the other money of the bank in his possession, and on the next morning turned over in bulk with other moneys to the bank's paying teller. On the diary of the bank, and on its book of bills discounted, credit entries were made indicating that the Young note had been paid. The bank, however, did not take up the note. On May 8, 1891, the Spring Garden National Bank suspended payment, and its assets were taken possession of by the bank examiner, who, on June 1, 1891, transferred them to Benjamin F. Fisher, the receiver appointed for the bank by the comptroller of the currency. Among the other assets which came into the hands of the bank examiner on the failure of the bank was the sum of \$34,042.73 in bills, silver dollars and fractional currency, which sum, less about \$1,000 paid out by him for wages, etc. was turned over to the receiver. At no time between April 29, 1891, and the day on which it closed its doors, did the bank have on hand in cash less than \$24,000. On June 17, 1893, judgment was entered against the complainants in favor of the clearing-house committee, in an action instituted by the latter for collection of this note, in court of common pleas No. 4 for the county of Philadelphia, of December Term, 1892, No. 881, for the amount of \$1,377.50, and this judgment, with interest and costs, was paid by the complainants November 9, 1893."

The plaintiffs claim that the transaction established a fiduciary relation between the parties, while the defendant claims that it established the relation of debtor and creditor only. If the question was new, its proper solution might be open to doubt. Even in such case however, I would adopt the plaintiff's view. The money was delivered and

received to extinguish the note. Neither party contemplated that the bank would use it for another purpose, leaving the note outstanding, and the plaintiffs' liability unextinguished. Such application of it, however, would be a violation of duty, and a fraud.

But the question is not new: It arose, and was decided, in *People v. City Bank of Rochester*, 96 N. Y. 32. The facts there were substantially like those before us. It is true that the check in that case was drawn in terms to pay the note. This, however, is an immaterial difference. It is as plain here as it was there that the money was delivered and received to take up the note. In *Peak v. Ellicott*, 30 Kan. 156, 1 Pac. 499, 46 Am. Rep. 90, the facts were identical with those before us. In each of these cases it was held that the transaction established a fiduciary relation between the parties.

The bank having failed to apply the money to the note, can it be recovered from the receiver? His counsel thinks not, because the bank placed the money in its vaults with other money of its own, whereby its identity was lost. Why should this wrongful act defeat the plaintiffs' right? Nobody is injured by allowing the plaintiffs to take the amount from the deposit. The receiver and creditors stand on no higher plane than the bank; and can no more assert that it was the bank's money than the bank could. It is true they are entitled to all the bank's property; but this was not its property. It is not important that plaintiffs' money bore no mark, and cannot be identified. It is sufficient to trace it into the bank's vaults, and find a sum equal to it (and presumably representing it), continuously remained there until the receiver took it. The modern rules of equity require no more. *Knatchbull v. Hallett*, 13 Ch. Div. 696; *National Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693; *Bank v. King*, 57 Pa. 202, 98 Am. Dec. 215; *Stoller v. Coates*, 88 Mo. 514; *McLeod v. Evans*, 66 Wis. 401, 28 N. W. 173, 214, 57 Am. Rep. 287; *People v. City Bank of Rochester*, 96 N. Y. 32; *Bank v. Weems*, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85; *Harrison v. Smith*, 83 Mo. 210, 53 Am. Rep. 571; *Beach Eq. Jur.* § 285; *Fisher v. Knight*, 9 C. C. A. 582, 61 Fed. 491.

I have not overlooked *Bank v. Dowd*, 38 Fed. 172, 2 L. R. A. 480. If that case can be distinguished from *Knatchbull v. Hallett*, as the judge who decided it believes, then it can as readily be distinguished from this. If it cannot, with all respect for that distinguished judge, I must disregard it. * * *

The bill is, therefore, sustained, and a decree may be drawn accordingly.¹⁸

¹⁸ *Wasson v. Hawkins* (C. C.) 59 Fed. 233 (1894); *Boone County Bank v. Latimer* (C. C.) 67 Fed. 27 (1895); *Cleveland, C., C. & St. Louis Ry. Co. v. Hawkins* (C. C.) 79 Fed. 29 (1897); *Merchants' National Bank v. School Dist. No. 8*, 94 Fed. 705, 36 C. C. A. 432 (1899); *Quin v. Earle* (C. C.) 55 Fed. 728 (1899); *Richardson v. New Orleans, etc., Co.*, 102 Fed. 780, 42 C. C. A. 619, 52 L. R. A. 67 (1900); *Richardson v. Olivier*, 105 Fed. 277, 44 C. C. A. 468, 53 L. R. A. 113 (1900); *In re Swift* (D. C.) 108 Fed. 212 (1901); *Woodhouse v. Crandall*, 197 Ill. 104, 64 N. E. 292, 58 L. R. A. 385 (1902); *Sherwood v. Savings Bank*, 103 Mich. 109, 61 N. W. 352 (1894); *Wallace v. Stone*, 107

THE EVANGELICAL SYNOD OF NORTH AMERICA
v. SCHOENEICH, Administrator of S. H. MERTEN & CO., Appellant.

(Supreme Court of Missouri, 1898. 143 Mo. 652, 45 S. W. 647.)

BURGESS, J.¹⁹ This is a proceeding in equity by which it is sought to charge the partnership estate of S. H. Merten & Company with a lien amounting to \$3,000 and interest, alleged to have been plaintiff's money, and to have been converted by said Company.

The firm of S. H. Merten & Company was composed of Stephen H. Merten, John F. Hackmann and William Hackmann. The firm did a general milling business for about twenty years in the city of St. Charles, and was dissolved by the death of John F. Hackmann on the eighteenth day of September, 1893. On the twenty-seventh of September, 1893, the defendant Henry J. Schoeneich, took out letters of administration on the partnership estate, and two days thereafter took out letters of administration on the individual estate of said John F. Hackmann. The partnership estate proved to be insolvent, paying not more than twenty-five cents on the dollar of its indebtedness. Both Stephen H. Merten and William Hackmann are insolvent; John F. Hackmann died insolvent. The plaintiff is a corporation duly incorporated under the laws of Missouri. Ever since 1887, one Rev. Reinhard Wobus who had charge of a congregation of the Evangelical Church at St. Charles, Missouri, was the treasurer of said synod up to the time of his death, November 5, 1894; and as such was the custodian of the funds and moneys belonging to said corporation. During the time of his service as treasurer said Wobus received in his capacity as such, various sums of money for said corporation, which he deposited with Stephen H. Merten & Company; this he did without the knowledge of the president of the synod who was during most of the time a resident of Burlington, Iowa. The firm knew that the funds deposited by Wobus really did not belong to him, but were the funds of the plaintiff, and were only held by him as its treasurer. Most of the money left by Wobus with S. H. Merten & Company consisted of checks for small amounts, payable to him individually as treasurer, which said firm deposited on its own account and to its credit in the

Mich. 190, 65 N. W. 113 (1895); Board, etc., v. Wilkinson, 119 Mich. 655, 78 N. W. 893, 44 L. R. A. 493 (1899); Bishop v. Mahoney, 70 Minn. 238, 73 N. W. 9 (1897); Shields v. Thomas, 71 Miss. 260, 14 South. 84, 42 Am. St. Rep. 458 (1893); State v. Bank of Commerce, 54 Neb. 725, 75 N. W. 28 (1898); State v. Bank of Commerce, 61 Neb. 181, 85 N. W. 43, 52 L. R. A. 858 (1901); City of Lincoln v. Morrison, 64 Neb. 822, 90 N. W. 905, 57 L. R. A. 885 (1902); Arnot v. Bingham, 55 Hun, 553, 9 N. Y. Supp. 68 (1890); People v. Merchants' Bank, 92 Hun, 159, 36 N. Y. Supp. 989 (1895); Kimmel v. Dickson, 5 S. D. 221, 58 N. W. 561, 25 L. R. A. 309, 49 Am. St. Rep. 869 (1894); Plano Mfg. Co. v. Auld, 14 S. D. 512, 86 N. W. 21, 86 Am. St. Rep. 769 (1901); Bank v. Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85 (1888); State v. Foster, 5 Wyo. 199, 38 Pac. 926, 29 L. R. A. 226, 63 Am. St. Rep. 47 (1894).

¹⁹ Only a part of the opinion is given.

Union Savings Bank of St. Charles. No interest was ever paid by the firm on these deposits, and whenever Wobus needed the money it was returned to him. On the twenty-fourth of August, 1893, there were \$3,300 in the hands of the firm thus deposited, of which Wobus on the fourteenth day of September, 1893, received \$300. When, however, he demanded the balance the firm was unable to return it for the reason that they had used it in their business.

Without the knowledge or consent of the president or other executive officers of the German Evangelical Society of North America, Mr. Wobus, on November 13, 1893, went before the probate court of St. Charles county, and had said \$3,000 allowed in his own name, against the partnership estate of Stephen H. Merten & Company, and \$300 in offset. Nothing was ever paid on this allowance and as soon as the president of the synod learned of it he denied that the synod had anything to do with it, and that Wobus had any authority to act for it in respect to said allowance, and soon thereafter instituted this suit. There was a decree in favor of plaintiff for \$3,000 with interest from the time of the institution of this suit; which was made a special lien upon the assets of the firm of Merten & Company in the hands of the administrator. Defendant in due time filed his motion for a new trial which being over-ruled he saved his exceptions and brings the case here by appeal for review. * * *

II. It is next contended by defendant that the relation between Wobus, or the plaintiff, and S. H. Merten & Company was that of creditor and debtor, general depositor and depositary, and not of cestui que trust and trustees, or special depositors and depositary. Upon the other hand plaintiff claims that the relation between the plaintiff and S. H. Merten & Company was that of cestui que trust and trustee. There can be no question under the facts disclosed by the record but that Wobus received and held the moneys and the checks upon which the funds in question were collected, as trustee for the plaintiff, and not otherwise. He had no personal interest in the funds and of this Merten & Company had full knowledge, so that whether he loaned the money to them or deposited it with them from time to time for safe keeping, makes no difference in this case. The administrator of the partnership estate is simply the representative of the partnership and occupies precisely the same position toward Wobus and plaintiff as the firm did. And the firm of Merten & Company, having received the benefit of the fund by unlawful conversion, the question is, should the partnership estate be charged with the amount of the converted funds as a preferred demand?

The general rule is, where trust funds have been so mingled with other funds of the trustee or agent, or with his bailee or depositary, and have not been invested in specific property so that it can be traced, the cestui que trust loses his lien, and can only come in and share with the general creditors of the insolvent estate which wrongfully converted the funds. The rule announced in *Little v. Chadwick*, 151

Mass. 109, 23 N. E. 1005, 7 L. R. A. 570, is as follows: "When trust money becomes so mixed up with the trustee's individual funds that it is impossible to trace and identify it as entering into some specific property, the trust ceases. The court will go as far as it can in thus tracing and following trust money; but where, as a matter of fact, it cannot be traced, the equitable right of the cestui que trust to follow it fails. Under such circumstances, if the trustee has become bankrupt, the court cannot say that the trust money is to be found somewhere in the general estate of the trustee that still remains; he may have lost it with property of his own; and in such a case the cestui que trust can only come in and share with the general creditors." [Authorities cited.]

In the case at bar there is no such thing as tracing the money deposited by Wobus with S. H. Merten & Company, into any particular property, nor was it attempted to be done. The most that can be said is that the Company had this money and other moneys of their own, all of which were deposited by them in the Union Savings Bank at St. Charles from time to time in their own name, and checked out by them for their own use and benefit as occasion might require. Merten & Company only had on deposit to their credit in said Bank at the time of the dissolution of the firm the sum of \$15.92. In the Elevator Company Case [3 N. D. 26, 53 N. W. 175], *supra*, it was held that: "Where the property of one is received by another, this, of itself does not entitle the owner to priority of payment out of the general assets of the one receiving the property. To recover his property, the owner must be able to trace and identify it in some form. When it is mingled indistinguishably with the mass of property of the one receiving it, or when, as in the case of money, it is paid out by him, the right to pursue it is lost, because identification is impossible. Mere enrichment of the estate or extinguishment of debts with the property received, will not make the owner thereof a preferred creditor." The case of *Bank v. Ins. Co.* [104 U. S. 54, 26 L. Ed. 693], *supra*, is regarded as the leading American authority on the question now under consideration, and the rule announced in that case is, that trust property will be followed by a court of equity so long as it can be traced, even though it be transformed, or be merged in a mass of which it forms a part; that the right rests upon principles of equity which entitle the beneficiary to a lien upon the property, but who, when seeking to recover the specific property, or to fix a charge upon a mass, must trace it, and show that the specific property claimed is his property, or that his property has gone into it and remains in the mass he seeks to recover. From the authorities cited, the rule seems to be that when the depository keeps the trust fund separate and the original money is capable of being identified, there is no question as to the right of the cestui que trust to have it applied to his benefit, but where the depository mingles the trust money with the mass of his own funds, and uses the entire fund indiscriminately, as was done in this case, and it is not invested in

specific property to which it can be traced, there is no possible way by which it can be identified and the right to pursue it is lost.

But the modern doctrine, and especially the adjudications by the appellate courts of this state go farther, and hold that when a trustee or bailee wrongfully mixes trust money with his own, so that it cannot be distinguished what particular part is trust money and what part is private money, equity will follow the money by taking out of the insolvent estate the amount due the cestui que trust, although it cannot be identified or separated from other funds with which it was mixed. In *Harrison v. Smith*, 83 Mo. 210, 53 Am. Rep. 571, a bank in this State undertook to make a loan of money on real estate security here for a party who resided in the State of New York, and kept a bank account there, and the plaintiff sent the bank making the loan a check for the sum to be loaned, payable to it, which was to be paid to the borrower when the terms of the loan were complied with. The bank credited the amount received to plaintiff and sent the check to its own correspondent in New York by whom it was collected and credited to the bank here, and in the meantime the latter led the plaintiff to believe that the loan had been perfected, and thereafter made an assignment for the benefit of its creditors. And it was held that the relation of trustee and cestui que trust, and not that of depositor and depositary, existed between the bank and the plaintiff. And that when a trustee mixes trust money with his own so that it cannot be distinguished what particular part is trust money and what part is private money, equity will follow the money by taking out of the assigned estate the amount due the cestui que trust. The same rule is announced in *Stoller v. Coates*, 88 Mo. 514, in which it is held that the general assets of an insolvent bank having received the benefit of the unlawful conversion of a trust fund, the bank was chargeable with the amount of the converted fund as a preferred demand; that while it may be impossible to follow a fund into its diverted use, it is always possible to make it a charge upon the estate or assets, to the increase or benefit of which it had been appropriated, and the general assets of the bank having received the benefit of the unlawful conversion, there is nothing inequitable in charging them with the amount of the converted fund, as a preferred demand. To the same effect is *Snorgrass v. Moore*, 30 Mo. App. 232; *Clark v. Bank*, 57 Mo. App. 281; *Bank v. Sanford*, 62 Mo. App. 394; *Brick Co. v. Schoeneich*, 65 Mo. App. 283; *Leonard v. Latimer*, 67 Mo. App. 138; *Peak v. Ellicott*, 30 Kan. 156, 1 Pac. 499, 46 Am. Rep. 90; *Thompson v. Bank* (N. J.) 8 Atl. 97; *Plow Co. v. Lamp*, 80 Iowa, 722, 45 N. W. 1049, 20 Am. St. Rep. 442. See, also, *Phillips v. Overfield*, 100 Mo. 466, 13 S. W. 705.²⁰ * * *

Judgment affirmed.

GANTT, P. J., and SHERWOOD, J., concur.

²⁰ *Banks & Bros. v. Rice*, 8 Colo. App. 217, 45 Pac. 515 (1896); *Hopkins v. Burr*, 24 Colo. 502, 52 Pac. 670, 65 Am. St. Rep. 238 (1898); *Davenport Plow*

THE DROVERS' & MECHANICS' NATIONAL BANK
v. D. & W. ROLLER.

(Court of Appeals of Maryland, 1897. 85 Md. 495, 37 Atl. 30, 36 L. R. A. 767, 60 Am. St. Rep. 344.)

Appeal from an order of the Circuit Court of Baltimore City (Dennis, J.), over-ruling exceptions to an Auditor's report and finally ratifying same.

McSHERRY, C. J., delivered the opinion of the court.²¹

There are two questions to be disposed of on this appeal, and they both arise upon exceptions to an Auditor's report. One involves quite an interesting question of law, the other chiefly a question of fact. The circumstances out of which the first arose are these: The firm or copartnership of Sheeler & Ripple had for a number of years been engaged in the live stock commission business in Baltimore. On the seventeenth day of January, 1895, D. & W. Roller of Tennessee, consigned to Sheeler & Ripple for sale a quantity of live hogs which when received by the consignees on the twenty-first, were sold in several lots for the consignors; and on January the twenty-fourth an account of sales, together with a check for the net amount of the proceeds after deducting commissions and freight charges was mailed to the consignors. On the thirty-first of January, Sheeler & Ripple, being then and apparently having been for some months anterior thereto hopelessly insolvent, executed a deed of trust for the benefit of their creditors, and when the check given to D. & W. Roller reached in due course on the second of February the Drovers' & Mechanics' National Bank upon which it had been drawn, there were no funds in bank to the credit of the drawers—they having previously overchecked their account—and the check was dishonored. The funds actually received by Sheeler & Ripple for the hogs sold had been paid out on other checks given for other demands. Most of the hogs were sold for cash and the proceeds, without earmark or identification, were placed to the credit of Sheeler & Ripple intermingled with funds of their own in the Drovers' & Mechanics' National Bank where the partnership account was kept; but a portion of the hogs had not been paid for by the purchasers of them when the deed of trust was made, and afterwards the trustees collected and now have in their hands these particular proceeds of sales. D. & W. Roller filed their claim in the trust estate for the whole net proceeds of sale and insist that they are entitled to a priority over other creditors to the extent of the whole net proceeds

Co. v. Lamp, 80 Iowa, 722, 45 N. W. 1049, 20 Am. St. Rep. 442 (1890); Peak v. Ellicott, 30 Kan. 156, 1 Pac. 499, 46 Am. Rep. 90 (1883); Reeves v. Pierce, 64 Kan. 502, 67 Pac. 1108 (1902); Carley v. Graves, 85 Mich. 483, 48 N. W. 710, 24 Am. St. Rep. 99 (1891); Harrison v. Smith, 83 Mo. 210, 53 Am. Rep. 571 (1884); Stoller v. Coates, 88 Mo. 514 (1885); Pundmann v. Schoenich, 144 Mo. 149, 45 S. W. 1112 (1898).

²¹ Only so much of the opinion as deals with the first question is given.

of the sales of their hogs. The assets in the hands of the trustees consist of collections made by them, but except as just stated, do not represent the proceeds of the sales of Roller's consigned hogs, or the proceeds of the sale of any other property in which the proceeds of the sales of those hogs had been invested. The first question is: Are D. & W. Roller entitled, under these circumstances, to a preferential lien upon the general assets of Sheeler and Roller in the hands of the trustees, for the full amount of the claim they have against the insolvent firm for the proceeds of the sale of the consigned hogs?

With respect to the proceeds of sale which actually went into the hands of the trustees after their appointment there can be and there is no difficulty whatever. When goods or chattels are consigned to a commission merchant or broker for sale, the title does not vest in the latter, but remains in the consignor and the money arising from a sale of them is the money, not of the agent, but of the owner of the consigned property. Hence, whenever the money can be traced it may be claimed by its owner, and upon an assignment being made for the benefit of creditors, the trustee can have no greater right to the money than his grantor, the consignee, possessed. The proceeds of the sales of Rollers' hogs that have actually gone into the possession of the trustee and which are capable of identification, belonged to the Rollers and must be paid over to them; but quite another and a different condition exists in regard to the proceeds received by the insolvent firm and spent or dissipated by them before the trustees were appointed.

The general doctrine in relation to the right of the owner of property or the cestui que trust to follow and reclaim his property is, we think, thoroughly settled. The early English cases only went to the extent of holding that the owner of property-intrusted to an agent, factor or trustee could follow and re-take his property from the possession of such agent, factor or trustees or others in privity with him, whether such property remained in its original, or had been changed into some different or substituted form, so long as it could be ascertained to be the same property or the product or proceeds thereof unless the superior rights of bona fide purchasers for value and without notice had intervened; but that such right of reclamation ceased when the means of ascertainment failed, as when the subject of the trust was money or had been converted into money and then mixed and confounded in a general mass of the same description, so as to be no longer divisible or distinguishable. The more recent rule, however, in England as to following trust moneys is broader and goes to the extent of holding that if money held by a person in a fiduciary character has been paid by him to his account at his bankers, the person for whom he held the money can follow it and has a charge on the balance in the bankers' hands; and that if a person who holds money in a fiduciary character pays it to his account at his bankers' and mixes it with his own money, and afterwards draws out sums by checks in the ordinary manner, the drawer must be taken to have drawn out his

own money in preference to the trust money. *Knatchbull v. Hallett*, 13 Ch. Div. 696. This court in *Englar v. Offutt*, 70 Md. 78, 16 Atl. 497, 14 Am. St. Rep. 332, following closely the Supreme Court of the United States in *Central National Bank v. Connecticut Ins. Co.*, 104 U. S. 54, 26 L. Ed. 693, has announced the same principles. But it is now insisted that the doctrine has been expanded and amplified, and that though the funds cannot be traced or identified, a lien still exists upon the debtor's general assets in the hands of his trustee, in favor of the owner or cestui que trust whose property or money has been mingled with that of the fiduciary, and has been used by him in liquidating other claims against himself; and that this lien is a preferential one over other creditors of the debtor. The theory upon which this supposed enlarged doctrine rests, is that inasmuch as the wrongful application of the trust funds reduces the general indebtedness of the fiduciary, his assets, swelled to the extent of that reduction, ought to be impressed with a trust or lien in favor of the person whose money or property has been improperly employed and used to discharge the individual indebtedness. There are some cases which support this view. *People v. City Bank*, 96 N. Y. 32; *McLeod v. Evans*, 66 Wis. 401, 28 N. W. 173, 214, 57 Am. Rep. 287; *Francis v. Evans*, 69 Wis. 115, 33 N. W. 93; *Bowers v. Evans*, 71 Wis. 133, 36 N. W. 629; *Harrison v. Smith*, 83 Mo. 210, 53 Am. Rep. 571, and some others. But it is obvious, even if these cases were not opposed to the general principles already alluded to, and even if they had not been questioned and some of them flatly overruled, that they proceed upon a wholly fallacious and untenable theory. They are founded upon the assumption that the misapplication of the trust funds by the fiduciary to the payment of his own debts actually swells the volume of his assets. This is the introduction of a new and unsound principle into an old and well known doctrine of equity. But instead of such a misappropriation swelling the volume of the debtor's assets, it would merely diminish the amount of his indebtedness, and this would benefit the estate only to the extent that it increased the percentage that the other creditors would receive provided the amount of the misappropriation were not deducted as a preferred demand. The case of *People v. City Bank*, 96 N. Y. 32, which was followed in *McLeod v. Evans*, 66 Wis. 401, 28 N. W. 173, 214, 57 Am. Rep. 287, if it can be held to support this new doctrine (for it is a brief opinion resting on no well defined principle), is in conflict with a more recent case of *Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504, wherein it was expressly decided in disposing of this very contention, that it was "quite too vague an equity for judicial cognizance," and that there was "no case justifying relief on such a circumstance." *McLeod v. Evans*, *supra*; *Francis v. Evans*, *supra*; *Bowers v. Evans*, *supra*; determined by a bare majority of the court, were subsequently over-ruled in *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. 383, the opinion of the court being delivered by one of the Judges who dissented in *McLeod v. Evans*,

and those cases are consequently no longer authority even in the State of Wisconsin. In *Slater v. Oriental Mills*, 18 R. I. 352, 27 Atl. 443; *Shields v. Thomas*, 71 Miss. 260, 14 South. 84, 42 Am. St. Rep. 458; *Ferchen v. Arndt*, 26 Or. 121, 37 Pac. 161, 29 L. R. A. 664, 46 Am. St. Rep. 603; *Philadelphia National Bk. v. Dowd, Receiver* (C. C.) 38 Fed. 172, 2 L. R. A. 480; *Little, Trustee, v. Chadwick et al.*, 151 Mass. 109, 23 N. E. 1005, 7 L. R. A. 570, the doctrine of the Wisconsin, Iowa, Kansas, Missouri and Texas cases is criticized and repudiated. The distinction between the two conditions that are presented when, first, trust funds remain in the insolvent estate and go to swell it, and when, secondly, trust funds have been dissipated or spent and used in the payment of debts due by the fiduciary, and, therefore, no longer constitute a part of his estate, is a perfectly manifest one; and the fundamental error underlying the cases we have been reviewing consists in confusing or confounding these essentially dissimilar conditions, and a consequent failure to distinguish between property which may be either specifically identified as belonging to the claimant, or money traced to and remaining in the hands of the factor or trustee, on the one hand; and, on the other hand, money arising from the sale of property confessedly never owned by the claimant or cestui que trust, or confessedly not purchased with money belonging to him. Creditors have no right to share in that which is shown not to belong to the debtor, and, conversely, a claimant has no right to take from creditors that which he cannot show to be equitably his own. But just here comes the argument that it is equitably his own, because the debtor has taken the claimant's money and mingled it with his estate, whereby the estate is swelled precisely that much. But obviously, as applicable to all cases, the argument is unsound. Where the property or its equivalent remains there can be no contention that the claim is just and enforceable; but where it has been dissipated and is gone, the appropriation of some other property in its stead simply takes from creditors that which clearly belongs to them. In one of the cases the illustration was used by Knight Bruce of a debtor mingling trust funds with his own in a chest; and in another Sir George Jessel likened the situation to that of a debtor who had mingled trust funds with his own in a bag. Though the particular money cannot be identified, the amount is swelled just so much and the amount added belongs to the cestui que trust. But where all the money has been spent—where Knight Bruce's chest and Jessel's bag is empty—there is no swelling of the estate at all; and in such a contingency it comes to this, that a court of equity is asked to order a like amount to be taken out of some other chest or bag, or out of the debtor's general estate, not because the creditors who are entitled to be paid out of that general estate have done any wrong, but because the debtor has been guilty of misconduct as a trustee. It comes down to the ordinary case of misfortune on the part of the claimant or cestui que trust whose confidence in a trustee has been abused. *Slater v. Oriental Mills*, *supra*.

But the case of *Englar v. Offutt*, 70 Md. 78, 16 Atl. 497, 14 Am. St. Rep. 332, affords, in our judgment, a complete answer to the contention of D. & W. Roller as respects that portion of their claim now under consideration. In that case it appeared that John P. Shriner had been engaged in business as a merchant and manufacturer under the name and style of John P. Shriner & Company. In May, 1883, he was appointed guardian of two infants and received something over ten thousand dollars belonging to them. On the day he received this money he deposited nearly all of it in the Howard Bank to his own credit in an account kept in the name of John P. Shriner & Company. Against this and all other credits, aggregating considerably more than double the guardianship fund, he checked and drew out, as he needed the money, the whole amount of his deposits, except the trifling sum of forty-eight dollars and forty-nine cents. In December, 1885, Edward C. Shriner became a partner of his brother John P. Shriner. In November, 1886, the firm made a deed of assignment for the benefit of creditors, and the trustees sold all the assets of the firm and these realized about nine thousand five hundred dollars. Thereupon the infants whose money had gone into the business of John P. Shriner filed a petition in the trust estate claiming a priority over the other creditors of the firm in the distribution of the net proceeds of the sales of the firm's assets. After stating the general rule as we have heretofore announced it, we said: "The sole question therefore in every case where trust property is attempted to be traced is, whether it can or cannot be identified either in the original or altered form." Then after discussing the evidence and showing that the whole trust fund had been drawn out, and that there was nothing in the testimony tending to show that the stock which went into the hands of the trustees had been purchased with the trust funds, the opinion proceeds: "And such being the case, the claim of the appellants upon the fund for distribution is altogether too indefinite. At most it is but matter of conjecture, for it is impossible to say, as this case is presented, and after the great lapse of time that has occurred, whether any, or, if any, what portion of the stock of goods that passed into the hands of the assignee, under the general assignment for benefit of creditors, was the proceeds of the trust fund belonging to the appellants. * * * It is clear, therefore, that the fund now in court for distribution cannot be identified as the product of any investment of the original trust fund belonging to the appellants," who were the infants. And because this could not be done, the relief was denied, though, had the doctrine of the *Wisconsin* and other cases heretofore cited, been considered the law, the fund, notwithstanding the trust money had not been traced into the purchase of the firm's assets, could have been impressed with a preferential trust and the ward's claim would have prevailed over the debts due to the general creditors of the firm.

In our opinion, then, so much of the claim of D. & W. Roller as the firm of Sheeler & Ripple actually collected before the appointment of

the trustees, is not entitled to a priority because the funds had been spent or dissipated and did not in any form go into the hands of the trustees, and, therefore, as to that portion of their claim they are simply general creditors standing on the same footing with other general creditors of Sheeler & Ripple; though as to so much of the proceeds of the sales of the consigned hogs as the trustees have collected and which, consequently, is capable of identification, the Rollers are entitled to a priority.²² * * *

²² *Multnomah County v. Oregon Nat. Bank* (C. C.) 61 Fed. 912 (1894); *Spokane County v. First Nat. Bank*, 68 Fed. 979, 16 C. C. A. 81 (1895); *City Bank v. Blackmore*, 75 Fed. 771, 21 C. C. A. 514 (1896); *Metropolitan Nat. Bank v. Campbell Commission Co.* (C. C.) 77 Fed. 705 (1896); *St. Louis Brewing Association v. Austin, Receiver*, 100 Ala. 313, 13 South. 908 (1893); *Bank of Florence v. United States Savings & Loan Co.*, 104 Ala. 297, 16 South. 110 (1893); *Winston v. Miller*, 139 Ala. 259, 35 South. 853 (1903); *Ober Co. v. Cochran*, 118 Ga. 396, 45 S. E. 382, 98 Am. St. Rep. 118 (1903); *Lanterman v. Travous*, 174 Ill. 459, 51 N. E. 805 (1898); *Estate of Seiter v. Mowe*, 182 Ill. 351, 55 N. E. 526 (1899); *Windstanley v. Second Nat. Bank*, 13 Ind. App. 544, 41 N. E. 956 (1895); *McComas v. Long*, 85 Ind. 549 (1882); *Pearce v. Dill*, 149 Ind. 136, 48 N. E. 788 (1897); *Robinson v. Woodward*, 48 S. W. 1082, 20 Ky. Law Rep. 1142 (1899); *Englar v. Offutt*, 70 Md. 78, 16 Atl. 497, 14 Am. St. Rep. 332 (1889); *Little v. Chadwick*, 151 Mass. 109, 23 N. E. 1005, 7 L. R. A. 570 (1890); *Bishop v. Mahoney*, 70 Minn. 238, 73 N. W. 6 (1897); *Twohy Mercantile Co. v. Melbye*, 78 Minn. 357, 81 N. W. 20 (1899); *Shields v. Thomas*, 71 Miss. 260, 14 South. 84, 42 Am. St. Rep. 453 (1892); *City of Lincoln v. Morrison*, 64 Neb. 822, 90 N. W. 905, 57 L. R. A. 885 (1902); *Perth Amboy Light Co. v. Middlesex County Bank*, 60 N. J. Eq. 84, 45 Atl. 704 (1900); *Ellicott v. Kuhl*, 60 N. J. Eq. 333, 46 Atl. 945 (1900); *O'Callaghan's Case*, 64 N. J. Eq. 287, 51 Atl. 64 (1902); *Matter of Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504 (1887); *Atkinson v. Rochester Printing Co.*, 114 N. Y. 168, 21 N. E. 178 (1889); *Matter of North River Bank*, 60 Hun, 91, 14 N. Y. Supp. 261 (1891); *People v. American Loan & Trust Co.*, 2 App. Div. 193, 37 N. Y. Supp. 780 (1896); *Cole v. Cole*, 54 App. Div. 37, 66 N. Y. Supp. 314 (1900); *Matter of Hicks*, 170 N. Y. 195, 63 N. E. 276 (1902); *North Dakota Elev. Co. v. Clark*, 3 N. D. 26, 53 N. W. 175 (1892); *Ferchen v. Arndt*, 26 Or. 121, 37 Pac. 161, 29 L. R. A. 664, 46 Am. St. Rep. 603 (1894); *Muhlenberg v. Loan & Trust Co.*, 26 Or. 132, 38 Pac. 932, 29 L. R. A. 667 (1894); *Re Assignment Bank of Oregon*, 32 Or. 84, 51 Pac. 87 (1897); *Freiberg v. Stoddard*, 161 Pa. 259, 28 Atl. 1111 (1894); *Bank's Assigned Estate*, 166 Pa. 622, 31 Atl. 334 (1895); *Slater v. Oriental Mills*, 18 R. I. 352, 27 Atl. 443 (1893); *Arbuckle Bros. v. Kirkpatrick*, 98 Tenn. 221, 39 S. W. 3, 36 L. R. A. 285, 60 Am. St. Rep. 854 (1896); *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. 383 (1894); *Burnham v. Barth*, 89 Wis. 362, 62 N. W. 96 (1895); *Thuemmler v. Barth*, 89 Wis. 381, 62 N. W. 94 (1895); *Henika v. Heinemann*, 90 Wis. 478, 63 N. W. 1047 (1895); *Gianella v. Momsen*, 90 Wis. 476, 63 N. W. 1018 (1895); *Stevens v. Williams*, 91 Wis. 58, 64 N. W. 422 (1895); *Dowie v. Humphrey*, 91 Wis. 98, 64 N. W. 315 (1895); *Hyland v. Roe*, 111 Wis. 361, 87 N. W. 252, 87 Am. St. Rep. 873 (1901); *State v. Foster*, 5 Wyo. 199, 38 Pac. 926, 29 L. R. A. 226, 63 Am. St. Rep. 47 (1895).

CHAPTER VII.

CONSTRUCTIVE TRUSTS AND THE STATUTE OF FRAUDS.

BURT et al. v. BOWLES et al.

(Supreme Court of Indiana, 1879. 69 Ind. 1.)

From the Orange Circuit Court.

BIDDLE, J.¹ Complaint in four paragraphs by the appellants against the appellees. The substantial facts averred in the first paragraph are as follows:

That the plaintiffs were possessed in their own right of a considerable estate in moneys; that the defendant, Julia Bowles is the widow of William A. Bowles, deceased, and the said defendants William A. Dill and Mary Mac. Dill are the grandchildren and heirs-at-law of William A. Bowles; that said Bowles became the guardian of the persons and property of the plaintiffs, and became possessed of the property, as such guardian, during their minority, and, after their majority, as their friend and agent, had the control and management thereof until his death, on the 28th of March, 1873; that, by the death of an aunt, Evaline Burt, the plaintiffs became possessed of an additional estate of great value; that said Evaline, in contemplation of death, and reposing great faith, confidence and trust in said Bowles, who pretended great interest and friendship for the plaintiffs, and who was reputed a man of great wisdom, financial skill and acumen, committed to his charge the custody, care and control of the plaintiffs and their interest in her said estate, enjoining upon these plaintiffs, who were then of full age, that they should allow the said Bowles to control their said affairs, which, in deference to the wish of their dying relation, they agreed to do, themselves believing that he was, and would continue to be, their friend and faithful adviser; that said Bowles accepted said trust, and promised the said Evaline and these plaintiffs that he would guard and protect their interest and manage their affairs; that certain lands, the title to which was then in the said Bowles, but the purchase money of which was paid out of the moneys belonging to the plaintiffs, should be conveyed to the plaintiffs, and improved for their future home; that said Bowles did convey to the plaintiffs, as tenants in common, in the year 1867, the said lands, to wit: (Here the lands are described); that, in the year 1868, the said Bowles, pretending great affection for the plaintiffs, and being involved in domestic troubles, and being old, and plaintiffs feeling a great regard for him, in-

¹ A part of the opinion is omitted.

duced the plaintiffs to move upon said lands, and did thereafter for a period of years furnish him a home, nursing and caring for him in sickness and in health; that said Bowles, with the money and means of the plaintiffs, made valuable and lasting improvements on the said land, at the cost of five thousand dollars; that, in the year 1868, the then wife of Bowles, from whom he had separated, in an action for divorce, obtained a decree for alimony in the amount of twenty-five thousand dollars, which, being still unpaid, amounts in the aggregate to the sum of thirty-five thousand dollars; that by reason of said decree, and other judgments, he became and was greatly embarrassed financially, during all which time he continued to act as agent of the plaintiffs, and manager of their moneys and estate—the plaintiffs being ignorant of these facts—he falsely and fraudulently pretending to be able to pay off all said liens upon his land, and account to them; that having the full confidence of the plaintiffs, and knowing that they were ignorant of his financial condition, and intending to cheat them, as hereinafter set forth, he entered into a matrimonial alliance with the said Julia; that immediately after his marriage with Julia, they began to conspire together to cheat, wrong and rob the plaintiffs of their moneys and lands; that, pretending to set their hearts upon said lands and house of plaintiffs for a home for themselves, the said Bowles, with the connivance and procurement of said Julia, did, on the 8th day of July, 1872, and in divers times thereafter, represent to the plaintiffs that he was old, that said land and house suited him, that he had other lands which would better suit them, and that, in view of his kindness to them, they ought to convey to him their said house and place heretofore mentioned, and fraudulently represented to them that, if they would do so, he would, with his said wife, convey to Rachel Burt, for her interest therein, certain lands described, by a deed of warranty, and that, before doing so, he would discharge said lands of all liens and incumbrances, so that the plaintiffs should have a good title thereto; that, still confiding in said Bowles, and believing that he could and would do as he promised, they did, on the 3d day of July, 1872, convey, by deed of warranty, to the said Bowles, the said lands hereinbefore first described, which were wholly unincumbered and of the value of ten thousand dollars, and that they put said Bowles and said Julia in possession thereof; that, at the time the said Bowles and Julia well knew that said Bowles could not and did not intend to discharge said lands of their liens, which were greater than the value of the lands; that said Bowles knew that these plaintiffs were ignorant of the fact that without a writing the said promise to convey by the said Bowles could not be enforced, and that they were ignorant that the said Julia could not be compelled to join in said conveyance, which facts he suppressed and kept from them, though he well knew that they relied upon him for the protection of their rights and interests; that, at the time, said Bowles well knew these facts, and that said Julia would not and did not intend to join in making said conveyance to said plaintiffs,

and well knew that he was not able and could not and did not intend to discharge said liens nor make such conveyance, but so fraudulently pretended and represented, to cheat and wrong these plaintiffs; that Bowles never paid any part of said liens, but afterwards died, at the date before stated, intestate, leaving Julia his widow, and these plaintiffs his grandchildren, and sole heirs at law, as aforesaid; that the assets of his estate are not sufficient to pay off said liens on said lands, and there is no person of whom they can obtain title thereto. Prayer that this conveyance to Bowles be set aside, cancelled and held for naught, and that the title to said lands be quieted and the possession thereof given to them and for damages in one thousand dollars.

The second paragraph of the complaint is not substantially different from the first; but the averments are not as fully made, and it prays for a rescission of the contract, for the recovery of rents, and that the title may be quieted in the plaintiffs, etc.

The third paragraph of the complaint is in the following words:

"And, for a further and third paragraph herein, said plaintiffs say that they are the owners by complete equitable title, and entitled to the possession, of a tract of land, to wit: The west half of the north-east quarter of section 3, in township 1 north, of range 2 west, lying and being in said county and State; and that defendants now hold possession of the land without right, and for three years last past have unlawfully kept plaintiffs out of possession of the same. Wherefore they demand judgment for the recovery of the land and the legal title thereto, and two thousand dollars for being kept out of the possession, and for other proper relief."

The fourth paragraph of the complaint contains a brief and imperfect statement of the facts averred in the first, with a similar prayer.

A separate demurrer, alleging a want of sufficient facts to constitute a cause of action, was sustained to each paragraph of the complaint; upon which, the plaintiffs refusing to amend, the court rendered judgment for the defendants.

These rulings are assigned as error in this court, and present the only questions reserved in the record for our consideration.

The appellants have presented us with a careful and elaborate brief, but the appellees have not favored us with any argument.

It will be observed, upon the face of this complaint, that the representations alleged to be false are not concerning facts existing at the time they were made, except as to the fact of the great confidence the plaintiffs reposed in William A. Bowles. The representations touching the alleged exchange of lands which Bowles sought to effect were, that he would pay off the incumbrances on the lands which he proposed to convey to the plaintiffs in exchange for the lands which the plaintiffs conveyed to him, and he would convey the said lands to the plaintiffs, and that his wife, Julia, should join in the deed. These representations are not of facts existing at the time he is alleged to have made them, but were promises to be performed at a future time. It is well set-

tled that representations, to be fraudulent, must be made concerning existing facts, and that promises made to be performed in the future, though fraudulently made and afterward broken, do not constitute fraud. The authorities upon this point are numerous. We cite some of the latest. *Fouty v. Fouty*, 34 Ind. 433; *President and Trustees of Hartsville University v. Hamilton*, 34 Ind. 506; *Bacon v. Markley*, 46 Ind. 116; *Jagers v. Jagers*, 49 Ind. 428; *Welshbillig v. Dienhart*, 65 Ind. 94.

The other false representations, or rather suppressions of the truth, are that Bowles suppressed and kept from the plaintiffs the fact, which he well knew, that his promise to convey the lands which he agreed to give the plaintiffs in exchange for the land conveyed to him by them could not be enforced unless it was made in writing, and that his wife Julia could not be compelled to join her husband in the conveyance of them, which fact Bowles also well knew and concealed from the plaintiffs. These facts are concerning the law, upon which fraud cannot be predicated, however false and fraudulent they may be, and whether they are suppressions of truth or representations of falsehood. Every person is bound to know the law, and not to be deceived by its suppression or false representation. This is a necessary maxim, lying at the foundation of government and jurisprudence, and without which neither government nor jurisprudence could exist as a system.

If the alleged representations of Bowles had been made affirmatively, that his promise to convey the lands could be enforced without being in writing, and that his wife, Julia, could be compelled by law to join him in the conveyance, however fraudulently made, they would not amount to a legal fraud. *Platt v. Scott*, 6 Blackf. 389, 39 Am. Dec. 436; *Mears v. Graham*, 8 Blackf. 144; *Dickerson v. Board of Commissioners of Ripley County*, 6 Ind. 128, 63 Am. Dec. 373; *Clem v. Newcastle & Danville Railroad Co.*, 9 Ind. 488, 68 Am. Dec. 653; *Reed v. Sidener*, 32 Ind. 373; *Boland v. Whitman*, 33 Ind. 64; *President, etc., of Hartsville University v. Hamilton*, 34 Ind. 506; *Smither v. Calvert*, 44 Ind. 242; *City of Lafayette v. State ex rel. Jenks*, 69 Ind. 218.

But, because there was no legal fraud committed on the appellants by Bowles, and because the statute of frauds stands in the way of the enforcement of the contract against Bowles, it does not follow that the facts stated in the first paragraph do not constitute a cause of action. It is a familiar principle that money paid, or personal property delivered, or real estate conveyed, under a void contract or a contract which cannot be enforced, may be recovered back or compensation recovered therefor. In the case before us, as the alleged express contract of Bowles cannot be enforced, the implied contract arises at once that he will return the property obtained under it, or render compensation therefor; and we do not see why the contract may not be rescinded as between the representatives of Bowles and the appellants, unless other rights have intervened to prevent a rescission. As, by the allegations, the appellants received nothing under the contract, they

have nothing to restore before asking a rescission. And, as between the parties, they can be placed in statu quo.

We think the demurrer to the first paragraph should have been over-ruled. * * *

The judgment is reversed, at the costs of the appellees, and the cause remanded with instructions to over-rule the demurrers to the complaint, and for further proceedings.²

HAIGH v. KAYE.

(Court of Appeal in Chancery, 1872. Law Reports 7 Chancery Appeal Cases, 469.)

This was an appeal from a decree of the Master of the Rolls.

On the 8th of December, 1860, the plaintiff, G. A. Haigh, conveyed a freehold estate, called the Thorncliffe estate to the defendant, Robert Kaye, in consideration of the sum of £850.

Although that sum was expressed in the deed to be paid by the defendant to the plaintiff, the money was in fact the plaintiff's money, and he handed it to the defendant in order that it might be repaid as the nominal consideration for the conveyance. Under these circumstances the plaintiff alleged that the estate was conveyed to the defendant as a trustee for him.

On the 23rd of November, 1867, disputes having arisen between the plaintiff and defendant, an agreement was signed by them to refer all matters in dispute respecting the transfer of the Thorncliffe estate and other money transactions to arbitration; but the defendant subsequently withdrew from the arbitration and no award was made.

The plaintiff having applied to the defendant to re-convey the estate, and the defendant having refused, the plaintiff filed his bill praying that the defendant might be declared to be a trustee for the plaintiff of the Thorncliffe estate, and might be directed to convey it to him.

Defendant in his answer said as follows:

"Near the end of the year 1860 the plaintiff, who is my brother-in-law, being a party to the suit of Haigh v. Haigh, then pending in this Honorable Court, and fearing an adverse decision in such suit, made overtures to me for the sale of the said estate; but I was unable at that time to withdraw from my business the money required to pay for the purchase thereof. The plaintiff had previously, as I believe, attempted to sell the said estate to another person, who, however, declined to give more than £600. for it. The plaintiff then, being desirous to sell the said estate for the reasons above referred to, and being also desirous that I should purchase such estate, and that the

² Ramey v. Slone, 62 S. W. 879, 23 Ky. Law Rep. 301 (1901); Dickerson v. Mays, 60 Miss. 388 (1882), *supra*, p. 14.

same should be vested in me (but not, save as appears by this my answer to the statements contained in other parts of it to which I refer, as trustee for the plaintiff), induced me to take a conveyance thereof, it being understood that I should account to the plaintiff for the rents and profits until such time as I could make arrangements for purchasing or paying the purchase money for the property; and, in fact, by a deed bearing date about the 8th day of December, and in consideration of the sum of £850. therein expressed to have been paid by me to the plaintiff, the plaintiff did convey the said estate to me, my heirs and assigns. * * * I admit that it was intended that I should convey the estate to the plaintiff when he should desire me to do so, unless arrangements were completed for the purchase or payment of the purchase money by me, and that in the meantime I should, until such arrangements were finally made, account to the plaintiff for the rents and profits of the property."

The defendant also stated as follows:

"The rents and profits of the said Thorncliffe estate have been received by me since the date of the said conveyance, and I have accounted to the plaintiff for the same, or at all events for the amount thereof up to the 3rd of February, 1863, when the arrangements for purchasing the property and paying the purchase money therefor were finally settled."

The defendant also alleged that he had expended several hundred pounds of his own money on repairs and improvements on the property. He now claimed to hold the estate as his own, discharged from any trust for the plaintiff; and he claimed the benefit of the Statute of Frauds.

In his affidavit in support of his case the defendant said: "On the 3rd of February, 1863, the arrangement for my purchasing the Thorncliffe estate was completed by my agreeing to pay, and by the plaintiff agreeing to accept, the sum of £800. for such estate. It was arranged between us that this sum should be paid by instalments, as I could spare the money from my business. I paid the full amount of such purchase money by instalments, between the 11th of February, 1863, and the 29th of January, 1867. I also paid divers sums of money to various persons by the order and direction of the plaintiff; and for other moneys due to me on the settlement of account with the plaintiff I take credit."

The Master of the Rolls declared that the defendant was a trustee of the Thorncliffe estate for the plaintiff, and ordered an inquiry what sums had been received by the defendant on account of the rents and profits, and of his application thereof, and also what sums had been properly expended by him in permanent improvements on the estate, or in the management thereof, and declared that the defendant had a charge on the estate for the amount (if any) which was due to him; and he ordered that, without prejudice to the lien, the defendant should convey the estate to the plaintiff.

The defendant appealed from this decree. After the institution of the suit the plaintiff, G. A. Haigh, died, and the suit was revived by his son, the present plaintiff.

SIR WM. JAMES, L. J. I am of opinion that the decree of the Master of the Rolls must stand.

The defendant admits that there was a conveyance given to him purporting to be executed in consideration of £850. paid by him to the original plaintiff, G. A. Haigh, by which he became, by purchase, owner of the estate. He admits that there was no such transaction in fact as any sale to him, but that the payment of the £850. was a mere form, and that the plaintiff paid the expenses of the conveyance to him, or gave him the money to pay them. That being so, he goes on to admit that he was to hold the estate upon trust to pay the rents and profits to the plaintiff and when the plaintiff called upon him for a re-conveyance he was to re-convey it. The plaintiff has called upon him to re-convey the estate, and he suggests by way of answer to that, first of all vaguely and faintly, that this transaction was not altogether a straightforward transaction; that this transaction was entered into with a view to defraud somebody else. The defendant says in effect, "I am to remain in possession of the estate, because we were both of us engaged in a transaction contrary to the law, and you will not take it away from me to give it to a man who was as bad as I was in the matter; in fact it was an illegal and fraudulent transaction against somebody else, and where there is an equal crime the court ought to hold that in *pari delicto melior est conditio possidentis*." However the defendant has not raised that defense in the way in which, according to my judgment, such a defense ought to be raised. If the defendant means to say that he claims to hold property given to him for an immoral purpose, in violation of all honor and honesty, he must say so in plain terms, and must clearly put forth his own scoundrelism if he means to reap the benefit of it. Here he has simply said that the plaintiff, fearing an adverse decision in the suit of Haigh v. Haigh, conveyed the property to him. I think that is not sufficient.

The next objection taken was upon the Statute of Frauds. The defendant admits that he took the estate upon the most positive agreement to return it; but in another part of his answer he sets up the Statute of Frauds, and claims the estate as a right. Now the Statute of Frauds no doubt says, that a person claiming under any declaration of trust or confidence must show that in writing; but the statute goes on to say that no resulting trust, and no trust arising from operation of law, is within that enactment. I apprehend that it is clear that the Statute of Frauds was never intended to prevent the court of equity from giving relief in a case of a plain, clear and deliberate fraud. The words of Lord Justice Turner, in the case of *Lincoln v. Wright* [4 De G. & J. 16], where he said, "The principle of this court is that the Statute of Frauds was not made to cover fraud," express a prin-

ciple upon which this court has acted in numerous instances, where the court has refused to allow a man to take advantage of the Statute of Frauds to keep another man's property which he has obtained through fraud. It is difficult to distinguish this case from that of *Childers v. Childers* [1 De G. & J. 482]. It is consistent entirely with *Davies v. Otty* [35 Beav. 208], which does not seem to me to carry the matter at all further than the decision of Lord Justice Turner in *Lincoln v. Wright*, where the Statute of Frauds was attempted to be set up in the same way by a man who claimed to take under an absolute conveyance instead of a mortgage.

That being so, the Statute of Frauds and the ground of supposed illegality of the whole transaction being set aside, the defendant comes into possession of this property as a trustee for the plaintiff. Then he says that although he was made a trustee there was a talk about his being the purchaser. He does not pretend to say that at that time there was any bargain, but he says that it was understood, before he was called upon to re-convey the property, that if he could make an arrangement to purchase it he was to have it.

[His Lordship then referred to the statements in the defendant's answer, and to the evidence on this subject, and continued:]

There is no direct evidence in writing in support of the defendant's contention, and it appears to me that the correspondence which passed between the plaintiff and defendant with reference to the arbitration is inconsistent with the existence of any such agreement. I am of opinion that defendant has failed to prove his case, and therefore that the decree is quite right in declaring that he is to be treated as a trustee of the property, and must re-convey it to the representatives of the original plaintiff.

SIR G. MELLISH, L. J. I am of the same opinion.³

FAIRCHILD v. RASDALL.

(Supreme Court of Wisconsin, 1859. 9 Wis. 379.)

By the Court, PAINE, J.⁴ This suit was brought by the plaintiffs as administrator and administratrix of the estate of Abel Rasdall, deceased, to enjoin the defendant from proceeding in a suit to recover possession of certain real estate in the city of Madison, and to compel a conveyance by him to the plaintiffs. The grounds set forth for

³ *Davies v. Otty*, 35 Beav. 208 (1865); *Booth v. Tourle*, L. R. 16 Eq. 182 (1873); *Davis v. Whitehead*, L. R. 2 Ch. 133 (1894); *Rochefoucauld v. Boustead*, L. R. (1897) 1 Ch. 196 (1896); *Clarke v. Eby*, 13 Grant's Chy. Rep. (Upper Canada) 371 (1867); *Catalini v. Catalani*, 124 Ind. 54, 24 N. E. 375, 19 Am. St. Rep. 73 (1889); *Ryan v. O'Connor*, 41 Ohio St. 368 (1884); *Peacock v. Nelson*, 50 Mo. 256 (1872).

⁴ The statement of facts and part of the opinion are omitted.

relief are that the plaintiffs' intestate, having in a personal encounter in 1843, dangerously wounded a man named Smith, and being apprehensive of arrest and prosecution, and desirous to so arrange his affairs that he might escape from the country, conveyed the property in question to the defendant, who was his brother; and that although the deed was absolute on its face, and purported to be for the sum of \$2,000, yet that it was without consideration, and that the defendant agreed to hold the property in trust, for the use and benefit of the deceased and his heirs. * * *

We have no doubt, from the evidence presented, that the conveyance was made by the deceased under the circumstances, and with the understanding set forth in the bill, though this is denied by the answer. And were this evidence proper to be received, it would fully sustain the decision of the court below. But it was parol evidence, it was all objected to by the defendant's counsel, and the objection is fatal.

It is one of those cases where the real merits and justice of the matter create a strong desire to escape from the application of the stern rule of law, which prohibits an inquiry by means of parol evidence. But the barrier is too strong to be broken over; and while it restrains us, furnishes its own justification in the fact, that though, in individual instances like the present, it may work hardship, yet in the main it promotes private security and the general good.

We do not feel called upon to cite authorities, to show that in the absence of fraud, accident, or mistake, parol evidence cannot be received to prove that a deed, absolute on its face, was given in trust for the benefit of the grantor; and we have not been able to find anything in this case to make it an exception. We cannot see why, if this evidence is to be received to establish this trust, every other deed in the state cannot be shown by parol to have been given on trust, and the statute of frauds be entirely annulled.

But the counsel for the complainants, seeming conscious of the difficulty of sustaining the admissibility of this evidence for the purpose of establishing the trust, yet contended that though inadmissible for that purpose directly, it should be admitted, and relief granted, on the ground of fraud. This presents a question of very great importance, and in view of the authorities on the subject, of no little difficulty. There is no doubt that if any fraud had been alleged, by means of which the defendant procured the conveyance from his brother to himself, or any mistake, by which the instrument was made absolute, instead of expressing the trust intended, parol evidence would have been admissible to show such fraud or mistake. This conveyance would thus stand upon the same footing with all other contracts, and come within the conceded power of courts of equity to inquire, by parol evidence, into frauds or mistakes in their procurement or execution.

But no such fraud or mistake is alleged here. On the contrary, it appears from the whole tenor of the complaint, that the conveyance

was made by Abel Rasdall upon his own motion, and without any solicitation or instigation of the defendant, and that it was intended to be, as it is, absolute on its face.

The only fraud alleged, therefore, is that of the defendant's now claiming the property in violation of the parol trust, and whether that constitutes such a fraud, as will justify a court of equity in overturning the written contract of the parties, upon parol evidence, is the question presented.

It cannot be denied that if the court can, by any legal means, arrive at the existence of the parol trust, then the violation of it by the defendant, in wresting their inheritance from the family of his deceased brother, is most grossly fraudulent. And to avoid such injustice, courts of equity have frequently seized upon the slightest circumstances connected with the procurement of the conveyance to avoid the operation of the statute of frauds. And there are cases, the principle of which would warrant the assertion that the attempt by the defendant to claim the rights which this deed, on its face, gives him, contrary to the parol trust, is such a fraud as would justify the relief upon parol evidence. But I confess my inability to see how, upon principle, this position can be sustained, consistently with a due observance of the statute. Placing the relief in such cases upon the ground of fraud, is implied by admitting that the parol evidence cannot be admitted to establish the trust, for the purpose of enforcing it, directly as a trust. And this is also expressly admitted. But it seems apparent to my mind that to say, in such a case, it shall be admitted to establish the fraud, is equally a violation of the statute. Because the fraud consists only in the refusal to execute the trust. The court, therefore, cannot say that there is a fraud, without first saying that there is a trust. And the parol evidence, if admitted, must be admitted to establish the trust, in order that the court may charge the party with fraud in setting up his claim against it. Conceding then, that they cannot execute the trust directly in such case, because it cannot be proved by parol, is it not a mere evasion of the statute to say, that they will allow it to be proved by parol for the purpose of enforcing it indirectly, by charging the party with fraud and for refusing to execute it? Such a course does not relieve the court from the charge of violating the statute, but subjects it to the odium of an attempted, but unsuccessful evasion.

It may be said that fraud ought not to be tolerated. That is very true, but that is not the question. The question is, whether the court, without violating the law, can get at the fraud. There is no doubt that trusts ought to be enforced; but that is not a sufficient reason for admitting parol evidence to establish it. When the party offers this, the court says no; the law forbids it.

So, however desirable it is to prevent fraud, if the fraud cannot be established, except by first showing a trust by parol, is not the same answer equally applicable? If not, it is difficult to see that the statute

of frauds is to have any practical effect; for although trusts and agreements contrary to the written contracts of parties, cannot be proved by parol so as to be enforced as such, yet they may be proved and held of sufficient force to charge the party with fraud in not observing them. And the result is practically the same. It is for courts to say to the parties, "These agreements are not valid, not binding; we cannot compel you to observe them; yet if you do not observe them without being compelled, we will hold that to be a fraud on your part, and for the fraud, will compel you to execute them."

It is impossible to reconcile with principle very many of the adjudications upon the statute of frauds. Courts seem to have been so intent upon administering justice in the particular case, that they have frequently lost sight of its provision, and their action has often amounted to little less than the exercise of the right to appeal, or suspending its operation whenever they deem that the real justice of the case required it. But the progress of adjudication upon the subject has been marked by many strong protests against the wide departure from principle, and the regrets expressed by courts that it had ever obtained. And the current of modern authority is in favor of returning to the due observance of the provisions of this law, according to their obvious intent.

But the distinction between fraud in procuring a conveyance, and that which arises only from the refusal to execute a parol trust or agreement, connected with a conveyance obtained without fraud, is not only clear upon principle, but is not without sanction.

In *Whitton v. Russell*, 1 Atk. 448, a testator was about to alter his will, so as to give one of the legatees fourteen pounds per annum more than he had already given him. It was suggested by the attorney, that if the other legatees would give a bond to pay the amount, it would be sufficient, and one of the others being present, promised that they would do it, and the will was not altered. The bill was filed to enforce the promise, but the Chancellor held it to be "against the statute of frauds," and he adds, "neither is there any ground for relief on the head of accident or fraud. Every breach of promise is not a fraud, nor does it appear that the testator was drawn in by this promise not to add the legacy to this codicil." The inference produced by the statement of facts in that case, is that the promise did induce the testator not to alter his will, in which case it would have been a fraud in procuring the will; but assuming it to be otherwise, as stated by the Chancellor, it was then the refusal by one having the legal title without fraud, to execute a trust which the testator had by parol declared, and which the devisee had promised to execute. And this the Chancellor held was not a fraud. He could only have meant that it was not such a fraud as to be relieved against, because in morals it was certainly a fraud.

In the case of *Hoge v. Hoge*, 1 Watts (Pa.) 163, 26 Am. Dec. 52, this very point was decided. The question arose as to the admissibility

of parol evidence to show that a devise of land was in trust, and it was conceded on all hands that it could not be admitted, except on the ground of fraud; and the question then occurred whether the mere refusal to perform the trust, was such a fraud as would justify its admission. Upon this point the court says: "The question has been as to the circumstances which constitute such a fraud as will be made the foundation of a decree. A mere refusal to perform the trust is undoubtedly not enough, else the statute, which requires a will of land to be in writing, would be altogether inoperative, and it seems to be requisite that there should have been an agency, active or passive, on the part of the devisee, in procuring the devise." And having found as a matter of fact that there was such agency in that case, they granted relief on the ground of fraud. And all the authorities referred to in the opinion, are cases in which there was some promise on the part of the defendant, by which the property was procured by himself, or by which he prevented a different disposition of it. The same distinction is recognized in *Pinnock v. Clough*, 16 Vt. 500, 42 Am. Dec. 521.

In the cases of *Dean v. Dean et al.*, 6 Conn. 285, *Bandor v. Snyder*, 5 Barb. (N. Y.) 63, *Lathrop v. Hoyt*, 7 Barb. (N. Y.) 59, and other similar cases which might be cited, the hardship of enforcing the statute was equally great as in this case, and in some of them the courts expressed their willingness to escape from its application if possible. But there was no suggestion that the mere refusal of the defendants to execute the parol trusts, was such a fraud as would take the case out of its provisions.

But the strongest support that seems to exist for the opposite view, may perhaps be derived from the cause of decision admitting parol evidence to show that a deed absolute on its face was given as security, and thereby converting it into a mortgage. It is true, there are some cases which have denied its admissibility for that purpose, as in *Streator v. Jones*, 5 N. C. 449, and in *Thompson v. Patton*, 5 Litt. (Ky.) 74, 15 Am. Dec. 44, which also both sustain the position that the fraud which justifies the admissibility of parol evidence, must be such as affects the transfer or disposition of the property. But there is a very long list of cases which have held parol evidence admissible thus to convert a deed into a mortgage. Some of them however recognize the distinction we have asserted, as in *Thomas v. McCormack*, 9 Dana (Ky.) 109. But many others have gone to the extent of saying that while there was no fraud or mistake in procuring or executing the deed, yet that the mere attempt to use the deed as absolute, is such a fraud as justifies the admissibility of parol evidence and the relief upon it. See *McIntyre v. Humphreys*, 1 Hoff. Ch. 34, where the Vice-Chancellor says it is "too late" to dispute the general doctrine, and that "the restriction of the rule adopted in some cases, that it must be shown that a defeasance was not made through accident, fraud or mistake, does not prevail" in New York.

The question is discussed to some extent in *Rogan v. Walker et al.*, 1 Wis. 527, decided by Justice Smith on stipulation. In that case there was a condition in the deed itself, and a bond was given by the complainant, which alone justifies the decision made; and so the learned judge held. But he then proceeded to show that even if there had been no such written evidence, parol evidence would have been admissible on the ground of fraud, and that the attempt to use a deed given as security, as absolute, was a sufficient fraud for the purpose. He cites many authorities which undoubtedly sustain the position, but in commenting on the cases heretofore cited from Barbour's Reports he held them not applicable, because they were cases of "express trusts" sought to be proved by parol, and says: "The court very properly decided that the statute of frauds was an insurmountable barrier." The ground of distinction suggested is, that the equity of redemption arises out of the transactions of the parties, and not out of the parol agreement. This distinction may be material in determining whether the admissibility of parol evidence is to be determined by the statute of frauds, or by the general rule prohibiting such evidence to contradict the written contracts of the parties.

It is conceded that fraud may take a case out of either the statute or the rule. But I suppose it would not be contended that in the absence of fraud there is anything in the peculiar nature of the equity of redemption that can have that effect. On the contrary, justifying its admission on the ground of fraud, which is the ground upon which it is placed by all these cases, is admitting that the case could not otherwise be taken out of the rule.

The question under consideration therefore was, what was a sufficient fraud for the purpose? And in determining this question, I can see no distinction between an express trust and a parol agreement making a deed a mortgage. If the refusal to abide by the latter is to be held on principle, to be such a fraud as takes the case out of the rule, and justifies parol evidence, I can see no reason why a refusal to execute an express trust, evidenced only by parol, should not be so held. The injustice, the wrong and the fraud are not only as great, but greater in the latter case than in the former. For in the former the party would only get the land for the money he had loaned, while in the latter he would get it for nothing. And if these cases are to be held correct upon principle, we can see no reason why the refusal by any party to perform a parol agreement, within the statute of frauds, should not be held such a fraud as would take the case out of the statute whenever such a refusal would work hardship and injustice upon the opposite party. But we must say that we think these decisions cannot be sustained upon principle, and that, if established by authority too firmly to be shaken, it must be regarded as an invasion upon the statute which cannot justify still further encroachment. And it is perhaps not so settled on authority as to be beyond question.

In *Stevens v. Cooper*, 1 John. Ch. (N. Y.) 425, 7 Am. Dec. 499, the question was, whether the effect of a mortgage could be varied by parol evidence, and Chancellor Kent, after referring to the general rule prohibiting such evidence as settled beyond discussion, adds: "Nor does this case come within any exception admitted here to the operation of the rule; for there is no allegation of fraud, mistake or surprise in making or executing the mortgage, and those I believe, are the only cases in which parol evidence is admissible in this court against a contract in writing."

It seems impossible upon principle to distinguish this case from that of the admissibility of parol evidence to vary the effect of a deed. And in *Webb v. Rice*, 6 Hill (N. Y.) 219, it is decided that such evidence is inadmissible in a court of law, and it is intimated that it could not be received in equity except to show fraud or mistake in the execution of the instrument. The dissenting opinions of Justice Bronson in *Webb v. Rice*, 1 Hill (N. Y.) 606, and *Swart v. Service*, 21 Wend. (N. Y.) 36, 34 Am. Dec. 211, show clearly that he confines the fraud, which is to justify the admission of parol evidence, to such as affected the execution of the instrument. And Mr. Justice Cowen, who delivered the opinion of the court in the latter case, rested it entirely on previous decisions in that state, by which they felt bound. But in speaking of these decisions he says: "For one, I was always at a loss to see on what principle the doctrine could be rested either at law or in equity, unless fraud or mistake were shown in obtaining an absolute deed, where it should have been a mortgage." "Short of that the evidence is in direct contradiction of the deed; and I am not aware that it has ever been allowed in any other courts of equity or law."

We will not pursue this part of the subject further. We do not of course purpose to pass upon the question, whether in the absence of fraud or mistake in its execution, an absolute deed can be converted into a mortgage. That question is not before us, but it is so nearly allied to the one before us, that we could not well determine the latter, without inquiring how it was affected by the decisions to which we have alluded. And as we think the rule they have established does not rest upon principle, however it may be determined upon authority, we do not feel warranted in following the rule which they would by analogy suggest. And we must hold that as the deed was made absolute to the defendant without any mistake, or fraud on his part, his mere refusal to perform the trust, is not such a fraud as will justify the admission of the parol evidence, and the enforcement of the trust. The reason is, that the law forbids us to be informed that there was a trust by that kind of evidence. It may and does undoubtedly work hardship in this case, and that we regret; but if parties will, in face of the positive provisions of the statute, risk their interests upon the honor or justice of others, and the security fails them, they have no right to ask courts to violate the law to furnish relief.

The counsel for the complainants contended that if we should be of the opinion that the trust could not be established, then it appearing that the consideration was not paid, they should be entitled to a vendor's lien for the amount expressed in the deed. The case of *Leman v. Whitley*, 4 Russ. 423, is relied on, and would seem to sustain the position. The bill was filed to establish a trust and obtain a re-conveyance. The court held parol evidence inadmissible, but decreed a vendor's lien for the consideration, under the prayer for general relief. We have felt a strong desire to follow this case, but upon a careful examination of the whole subject, have come to the conclusion that we cannot do so. The bill does not claim a vendor's lien. It proceeds upon an entirely different hypothesis. It alleges, it is true, that the consideration never was paid; but not for the purpose of recovering it, but because it was never intended or agreed to be paid. There is nothing in the bill to indicate to the defendant that he was to resist the claim for a vendor's lien, and we cannot but see that it would work a surprise upon him to grant such relief upon this bill. *Rathbun v. Rathbun*, 6 Barb. (N. Y.) 98; and *Philbrook v. Delano*, 29 Me. 410; and *Dean v. Dean*, 6 Conn. 285, all hold that such relief could not be granted upon a bill filed to establish the trust, without indicating in any way an intent to proceed for a lien. And we think this the only just rule upon the subject.

We are compelled therefore upon the whole case, to reverse the judgment of the court below, and direct a decree to be entered dismissing the complaint. At the same time we may express the hope that the defendant's conscience, to which his brother has trusted, may not suffer him so far to violate that trust as to detain their just inheritance from his wife and children.⁵

ALEXANDER CAMPBELL v. JOHN B. DEARBORN.

(Supreme Judicial Court of Massachusetts, 1872. 109 Mass. 130, 12 Am. Rep. 671.)

Bill in equity, filed July 12, 1869, to compel a re-conveyance of land by the defendant to the plaintiff, on the ground that the plaintiff's conveyance of it to the defendant, although in form absolute, was in substance a mortgage. The bill alleged that the plaintiff on June 11, 1866, agreed with Artemas Tirrill for the purchase by him from said Tirrill of a parcel of land in Charlestown, and at the same time Tirrill gave him a bond to convey the land at any time within three years from said June 11, upon the payment to him of \$5,500, the plaintiff to pay all assessments on the land in the meanwhile; that since taking the bond the plaintiff has occupied the land; that in the early part of June 1869

⁵ *Wolford v. Farnham*, 44 Minn. 159, 46 N. W. 295 (1890); *Marvel v. Marvel*, 70 Neb. 498, 97 N. W. 640, 113 Am. St. Rep. 792 (1903); *Sturtevant v. Sturtevant*, 20 N. Y. 39, 75 Am. Dec. 371 (1859).

he made arrangements to borrow the sum of \$5,500 from Charles J. Walker, in order to tender the same to Tirrill, and secure performance of his obligation to convey, within the time fixed in the bond; that on June 11, 1869, being disappointed in finding Walker, he met the defendant; that the defendant expressed regret that the plaintiff should be obliged to lose fulfilment of the bond through not having in time the money required, and voluntarily offered to lend to the plaintiff the required amount, and the plaintiff accepted the offer as an act of friendship, as he supposed; that the defendant and the plaintiff went immediately to Tirrill and tendered to him said sum of \$5,500, and Tirrill thereupon delivered to the plaintiff his deed of the land in fee simple, in compliance with the bond, which deed was dated May 21, and was acknowledged before the defendant as a justice of the peace on said June 11, 1869; that upon leaving Tirrill the defendant said to the plaintiff that he ought to be secured for his loan in some way, and proposed that they should go to the defendant's attorney, to have the necessary papers prepared; that they thereupon went to the attorney's office, where the defendant and the attorney consulted together privately, and, without consulting the plaintiff, an instrument was drawn, and handed to him to sign, which upon reading he found to be drawn to convey the land in fee simple to the defendant; that the plaintiff objected to this form of conveyance, and desired to have a mortgage drawn instead, but was assured by both the attorney and the defendant that the instrument prepared would have the same effect; that, being ignorant of the legal effect of said instrument made under such circumstances, and relying on the statements of the attorney and the defendant, he on said June 11 executed and delivered said deed to the defendant; and that it was recorded in the registry of deeds at the same time with Tirrill's deed.

The bill also alleged that the plaintiff believed, and, from the manner and declarations of the defendant at the time, had every reason to believe, that the loan was prompted by the kindness of a friend, and was a gratuitous loan, and one which he was to immediately repay, and he accepted it accordingly; that on the same day he asked the defendant how soon the money must be repaid, and the defendant replied, "In a few days;" that the plaintiff at the same time said to the defendant that he had arranged for a permanent loan on the land and that the matter could be settled on the next day, June 12; that on said June 12 Charles J. Walker, who had agreed to loan the plaintiff \$5,000 upon a mortgage on the land, was not ready to do so, as his attorney desired more time to examine the title, and the plaintiff went to the defendant and stated the occasion of delay, and asked him to be ready to receive the money advanced and execute a deed conveying the land back to the plaintiff the next Monday; that the defendant replied that he was going to Philadelphia on that day, but would settle the matter upon his return, which would be about June 17; and that at this interview, the plaintiff, feeling very grateful to the defendant for what

he had done, suggested that he was disposed to pay him for his trouble in the premises, but the defendant replied, "Never mind now, we will make that all right," from which the plaintiff inferred that the defendant would make no charge for the loan.

The bill further alleged that on the 17th, 18th and 19th of June the plaintiff endeavored to find the defendant and repay his loan and obtain his deed, but was unable to find him; that on the 21st of June the plaintiff saw the said attorney of the defendant, who had told him that the attorney was authorized to settle the matter, and said attorney informed the plaintiff that the defendant would not re-convey the land unless he was paid the sum advanced and \$500 besides for the use of the money, whereat the plaintiff was greatly astonished and so stated to the attorney; that the plaintiff afterwards saw the defendant, and objected to the charge, and gave him to understand that he supposed the loan to be gratuitous, but rather than have any ill feeling he would pay \$250; that the defendant refused to accept that sum; and that the plaintiff has been desirous of obtaining a re-conveyance of the land, and has tendered the defendant the said sum of \$5,500, with legal interest from the time of the loan, and has also tendered a deed reconveying the land to the plaintiff, to be executed by the defendant; but that the defendant refused to accept the tender and to execute the deed.

The prayer was "that the plaintiff may have proper relief in the premises; that an account may be taken of what, if anything, is due to the defendant for principal and interest on said loan; that the plaintiff may be permitted to redeem the land, he being ready and willing, and hereby offering, to pay what, if anything, shall appear to be due in respect of said loan and interest accrued; and that the defendant may be decreed to convey the land to the plaintiff in fee, free from all incumbrances made by him or any person claiming under him, and may be restrained from making any sale or conveyance thereof to any person or persons pending this bill."

The defendant, in his answer, denied that he ever made or offered to make any loan to the plaintiff; alleged that, on the contrary, he refused a request of the plaintiff for a loan; and further alleged that "the defendant agreed to pay Tirrill the said sum of \$5,500 for the premises described in the bill, provided the title to said premises should stand in the defendant's name," and the plaintiff agreed that immediately on payment of the sum to Tirrill the land should be conveyed in fee simple to the defendant, "and the plaintiff should not have any interest or title thereto;" that thereupon the defendant paid the \$5,500 to Tirrill, and Tirrill executed and delivered to the plaintiff a deed of the land; that the plaintiff did not have any title or interest in the purchase money or any part thereof, but the whole of it was property of the defendant; that the land was not purchased of Tirrill for the benefit of the plaintiff, "neither did the defendant agree to purchase it for the benefit of the plaintiff, but for the use and benefit of the

defendant;" that by said purchase the equitable title to the land was vested in the defendant; and that the plaintiff, in pursuance of his said agreement, did convey the land to the defendant in fee simple, "for the purpose of vesting both the legal and equitable title in the defendant;" that the agreement between the plaintiff and the defendant that the plaintiff should make such an absolute conveyance, and no other, was fair and distinct; that "before and at the time of said payment to said Tirrill" the defendant refused "to lend the plaintiff said money, and to allow the plaintiff to have any interest in said money or the premises purchased therewith," and that the plaintiff's deed was read in his presence and hearing before he executed it, and he was then and there informed that it was an absolute conveyance and that he thereby ceased to have any interest whatever in the land.

The answer also alleged that afterwards, and as an independent transaction, the defendant at the plaintiff's request orally agreed to re-convey the land to him for the consideration of \$6,000 to be paid on June 18, 1869, together with such charges as the defendant should make for his expenses incident to the several conveyances; that although the defendant then well knew, and still insists, that this agreement had no legal force or effect, for the reason that it was not in writing, yet on the day named he was ready and willing to perform his part of it, but the plaintiff neglected and refused to perform his own part or pay any sum whatever, and thereupon the defendant considered himself released from all obligations to the plaintiff; that on June 19, 1869, he made another oral agreement with the plaintiff to re-convey the land to him for the sum of \$6,000, together with such expenses as the defendant had incurred by reason of said conveyances, provided the agreement should be carried into effect forthwith, and the plaintiff then and there agreed to pay said sum; that the defendant on the same day executed a quit claim deed, with the usual covenants, conveying the land to the plaintiff in pursuance of this agreement, and has repeatedly tendered this deed to the plaintiff; but that the plaintiff refused to comply with the agreement, and to pay the expenses incurred by the defendant in the premises; and that the defendant "now and always has denied that the plaintiff had any right to or interest in said premises, except such as he may have acquired under said parol agreements made subsequently to and independently of the conveyance" from the plaintiff to the defendant.

The answer then denied "that the defendant, or anyone in his behalf, or at his request, or with his knowledge, ever made any representations or intimation to the plaintiff that the conveyance of the plaintiff to the defendant was or had the effect of anything but an absolute conveyance in fee simple;" alleged "that the plaintiff well knew the contents and the legal effect thereof, and the same was fully explained to and understood by the plaintiff before the execution thereof, and no assurances or intimations were made, at or before the execution or delivery thereof, that the land would be re-conveyed;" denied "that

the plaintiff had ever tendered to the defendant the amount paid by him and interest thereon, or any other sum as alleged;” set up the statute of frauds “in answer to the several averments of contracts, agreements, promises and trusts concerning the premises with, to or for the benefit of the plaintiff in the bill contained, and to so much of the bill as sets forth any pretended contract, agreement, trust or confidence between the plaintiff and the defendant, or as seeks any relief or discovery of the defendant, of or concerning any pretended contract, agreement, trust or confidence between the plaintiff and the defendant touching the land or premises mentioned in the bill or any part thereof;” denied “that the defendant, or any person thereunto by him lawfully authorized, did ever make or sign any writing whatsoever, of or containing any such contract, promise, agreement, grant or declaration with, to or for the benefit of the plaintiff touching the said land, or creating any estate or interest therein, or creating or declaring any trust respecting the same, in or for the benefit of the plaintiff”; and finally denied all the plaintiff’s allegations which were not above expressly admitted.

The plaintiff filed a general replication, and the case was heard by Colt, J., who made the following report thereof:

“The plaintiff was the only witness in support of his case, and testified substantially to the facts contained in the bill. The defendant testified in substance to the facts stated in his answer, and was confirmed in the main part of his evidence by the testimony of the attorney who prepared the deed from the plaintiff to him, but who also testified more fully to what was said between the parties at his office at the time the deed was executed. The witnesses appeared to me to be equally entitled to credit.

“I find as a fact, that the deed to the defendant was executed by the plaintiff intelligently, and not by accident or mistake; and that no fraud was practiced to procure its execution, other than may be inferred, if any, from the facts testified to and here found by me. I find, from all the circumstances surrounding the transaction, and from the acts and declarations of the parties at the time, that the plaintiff believed, and had reason to believe, that the payment made to Tirrill was made to prevent a forfeiture of the plaintiff’s rights under the contract, as a friendly act on the part of the defendant, with a view to give him further time to raise the money due thereon, and that the defendant would within a few days, on being repaid the purchase money and a compensation for his trouble, re-convey the same to him. It appeared that no definite time was named for the re-payment, and no definite amount was fixed as compensation; and that the defendant refused to take a mortgage instead of an absolute deed, insisting upon the ownership of the property, and the right to charge what he had a mind to for his services, in case he should re-convey.

“I report the case for the consideration of the full court, such order or decree to be entered as law and justice may require.”

WELLS, J.⁶ Regarding the money paid to Tirrill for the land as the money of the plaintiff, by loan from the defendant, there is still no resulting trust in favor of the plaintiff arising from the whole transaction. A deed was taken to the plaintiff, according to his equitable interest; and he thereupon conveyed to the defendant by his own deed. The recitals and covenants of that deed preclude him from setting up any trusts by implication, against its express terms. *Blodgett v. Hildreth*, 103 Mass. 484. His agreement with the defendant for a re-conveyance cannot be enforced as a contract for an interest in lands, Gen. St. c. 105, § 1; nor will it create an express trust, Gen. St. c. 100, § 19. The question then is, Can the deed be converted into a mortgage, or impeached and set aside, or its operation restricted, upon any ground properly cognizable in a court of chancery?

This question was somewhat discussed, though not decided, in *Newton v. Fay*, 10 Allen (Mass.) 505. Some suggestions were made as to the bearing of the statute of frauds upon it in *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418. For the reasons there suggested, we do not regard the statute of frauds as interposing any insuperable obstacle to the granting of relief in such a case; because relief, if granted, is attained by setting aside the deed; and parol evidence is availed of to establish the equitable grounds for impeaching that instrument, and not for the purpose of setting up some other or different contract to be substituted in its place. If proper grounds exist and are shown for defeating the deed, the equities between the parties will be adjusted according to the nature of the transactions and the facts and circumstances of the case; among which may be included the real agreement. It does not violate the statute of frauds, to admit parol evidence of the real agreement, as an element in the proof of fraud or other vice in the transaction, which is relied on to defeat the written instrument.

What will justify a court of chancery in setting aside a formal deed, and giving the grantor an opportunity to redeem the land, on the ground that it was conveyed only for security, although no defeasance was taken, is a question of great difficulty, and one upon which there exists a considerable diversity of adjudication, as well as of opinion. In *Story*, Eq. § 1018, it is stated in general terms to be "fraud, accident and mistake." In 4 Kent, Com. (6th Ed.) 142, 143, it is laid down that "parol evidence is admissible in equity, to show that an absolute deed was intended as a mortgage, and that the defeasance was omitted or destroyed by fraud, surprise or mistake."

"It is determined, on the statute of frauds, that, if a mortgage is intended by an absolute conveyance in one deed and a defeasance rendering it redeemable in another, the first is executed, and the party goes away with the defeasance, that is not within the statute of frauds." *Dixon v. Parker*, 2 Ves. Sen. 219, 225. Similar declarations

• A part of the opinion has been omitted.

are to be found in *Walker v. Walker*, 2 Atk. 98, *Joynes v. Stathem*, 3 Atk. 388, and *Maxwell v. Montacute*, Prec. Chy. 526; and adjudications in *Washburn v. Merrills*, 1 Day (Conn.) 139, 2 Am. Dec. 59, *Daniels v. Alvord*, 2 Root (Conn.) 196, and *Brainerd v. Brainerd*, 15 Conn. 575; and see *Story*, Eq. § 768.

This indeed is only one form of application of the general rule of equity, that one, who has induced another to act upon the supposition that a writing had been or would be given, shall not take advantage of that act, or escape responsibility himself, by pleading the statute of frauds on account of the absence of such writing, which has been caused by his own fault. Besides the cases cited in *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418, see *Bartlett v. Pickersgill*, 1 Eden, 515; s. c. 1 Cox Ch. 15; *Browne on St. of Frauds*, § 94. But this principle will not help the plaintiff here, because he does not allege that any defeasance was intended or expected; and it is found by the report that the deed "was executed by the plaintiff intelligently, and not by accident or mistake, and that no fraud was practiced to procure its execution, other than may be inferred" from the facts stated.

From those facts and from the bill and answer, we think that these points must be taken to be established, to wit, 1st, that the plaintiff had purchased the parcel of land in controversy and held a contract from Tirrill for its conveyance to himself upon payment of the sum of \$5,500; 2d, that the money was paid to Tirrill, and the land conveyed by Tirrill to the plaintiff, in fulfilment of that contract; 3d, that the money was advanced by the defendant to the plaintiff as a loan, and the deed from the plaintiff to the defendant was given by way of security therefor. The report finds, "from all the circumstances surrounding the transaction, and from the acts and declarations of the parties at the time, that the plaintiff believed and had reason to believe" this to be the case.

The defendant, in his answer, does not pretend that he ever made any contract, either with Tirrill or the plaintiff, by which a price was agreed upon to be paid by him as and for the purchase of the premises for himself. His only allegation to this point is, at most, indirect and equivocal. He denies that said estate was purchased of Tirrill for the plaintiff's benefit, "neither did this defendant agree to purchase it for the benefit of the plaintiff, but for the use and benefit of the defendant." This is followed by an argumentative assertion of equitable title acquired as a resulting trust from payment of the purchase money, and that the deed from the plaintiff was given "for the purpose of vesting both the legal and equitable title in the defendant." He does allege that he "agreed to pay Tirrill the said sum of \$5,500 for the premises described in the bill, provided the title to said premises should stand in the defendant's name." He alleges, with sufficient fulness and minuteness, that he refused to make a loan of the money to the plaintiff both "before and at the time of said payment to said Tirrill," and refused "to allow the plaintiff to have any

interest in said money, or the premises purchased therewith," and that it was agreed that the premises should be conveyed in fee simple to the defendant, "and the plaintiff should not have any interest or title thereto." He further avers, "that, before the plaintiff signed and executed his deed to this defendant, said deed was read in the presence and hearing of the plaintiff, and he was then and there informed that the same was an absolute conveyance, and that he ceased thereby to have any interest whatever therein." Taking the facts to be literally as thus alleged, they significantly suggest the inference that the money was advanced by the defendant for the accommodation of the plaintiff in his purchase of the land, and the deed given to the defendant for his security therefor; but that it was agreed between them that the plaintiff should retain no legal right of redemption. He was to trust himself wholly to the good faith and forbearance of the defendant.

It is alleged in the bill, and not denied in the answer, that the land has been all the time in the occupation of the plaintiff. We think it is also to be inferred that the land is of considerably greater value than the sum advanced by the defendant.

From the whole case we are satisfied that it was a transaction between borrower and lender, and not a real purchase of the land by the defendant. We are brought then to the question, Can equity relieve in such a case?

The decisions in the courts of the United States, and the opinions declared by its judges, are uniform in favor of the exercise of the power, and the propriety of its exercise by a court of chancery. *Hughes v. Edwards*, 9 Wheat. 489, 6 L. Ed. 142; *Sprigg v. Bank of Mount Pleasant*, 14 Pet. 201, 208, 10 L. Ed. 419; *Morris v. Nixon*, 1 How. 118, 11 L. Ed. 69; *Russell v. Southard*, 12 How. 139, 13 L. Ed. 927; *Taylor v. Luther*, 2 Sumn. 228, Fed. Cas. No. 13,796; *Flagg v. Mann*, 2 Sumn. 486, Fed. Cas. No. 4,847; *Jenkins v. Eldredge*, 3 Story, 181, Fed. Cas. No. 7,266; *Bentley v. Phelps*, 2 Woodb. & M. 426, Fed. Cas. No. 1,331; *Wyman v. Babcock*, 2 Curtis, C. C. 386, 398, Fed. Cas. No. 18,113; s. c. 19 How. 289, 15 L. Ed. 644. Although not bound by the authority of the courts of the United States, in a matter of this sort, still we deem it to be important that uniformity of interpretation and administration of both law and equity should prevail in the state and federal courts. We are disposed therefore to yield much deference to the decisions above referred to, and to follow them, unless we can see that they are not supported by sound principles of jurisprudence, or that they conflict with rules of law already settled by the decisions of our own courts.

We cannot concur in the doctrine advanced in some of the cases, that the subsequent attempt to retain the property, and refusal to permit it to be redeemed, constitute a fraud and breach of trust, which affords ground of jurisdiction and judicial interference. There can be no fraud or legal wrong in the breach of a trust from which the statute withholds the right of judicial recognition. Such conduct may

sometimes appear to relate back, and give character to the original transaction, by showing, in that, an express intent to deceive and defraud. But ordinarily it will not be connected with the original transaction otherwise than constructively, or as involved in it as its legitimate consequence and natural fruit. In this aspect only can we regard it in the present case.

The decisions in the federal courts go to the full extent of affording relief, even in the absence of proof of express deceit or fraudulent purpose at the time of taking the deed, and although the instrument of defeasance "be omitted by design upon mutual confidence between the parties." In *Russell v. Southard*, 12 How. 139, 148, 13 L. Ed. 927, it is declared to be the doctrine of the court "that, when it is alleged and proved that a loan on security was really intended, and the defendant sets up the loan as payment of the purchase money, and the conveyance as a sale, both fraud and a vice in the consideration are sufficiently averred and proved to require a court of equity to hold the transaction to be a mortgage." The conclusion of the court was, "that the transaction was in substance a loan of money upon security of the farm, and, being so, a court of equity is bound to look through the forms in which the contrivance of the lender has enveloped it, and declare the conveyance of the land to be a mortgage."

This doctrine is analogous, if not identical with that which has so frequently been acted upon as to have become a general if not universal rule, in regard to conveyances of land where provision for reconveyance is made in the same or some contemporaneous instrument. In such cases, however carefully and explicitly the writings are made to set forth a sale with an agreement for re-purchase, and to cut off and renounce all right of redemption or reconveyance otherwise, most courts have allowed parol evidence of the nature of transaction to be given, and upon proof that the transaction was really and essentially upon the footing of a loan of money, or an advance for the accommodation of the grantor, have construed the instrument as constituting a mortgage; holding that any clause or stipulation therein, which purports to deprive the borrower of his equitable rights of redemption, is oppression, against the policy of the law, and to be set aside by the courts as void. 4 Kent, Com. (6th Ed.) 159; Cruise, Dig. (Greenl. Ed.) tit. xv, c. 1, § 21;⁷ Washb. on Real Prop. (3d Ed.) 42; Williams on Real Prop. 353; Story, Eq. § 1019; Adams, Eq. 112; 3 Lead. Cas. in Eq. (3d Am. Ed.); White & Tudor's notes to *Thornbrough v. Baker*, p. 605 [*874] and seq.; Hare & Wallace's notes to same case, p. 624 [*894] and seq.

The rule has been frequently recognized in Massachusetts, where, until 1855, the courts have held their jurisdiction of foreclosure and redemption of mortgages to be limited to cases of a defeasance contained in the deed or some other instrument under seal. *Erskine v. Townsend*, 2 Mass. 493, 3 Am. Dec. 71; *Kelleran v. Brown*, 4 Mass.

⁷ See *Wright v. Bates*, 13 Vt. 341 (1841), ante, p. 11.

443; *Taylor v. Weld*, 5 Mass. 109; *Carey v. Rawson*, 8 Mass. 159; *Parks v. Hall*, 2 Pick. (Mass.) 206, 211; *Rice v. Rice*, 4 Pick. (Mass.) 349; *Flagg v. Mann*, 14 Pick. (Mass.) 467, 478; *Eaton v. Green*, 22 Pick. (Mass.) 526. The case of *Flagg v. Mann* is explicit, not only upon the authority of the court thus to deal with the written instruments of the parties, but also upon the point of the competency of parol testimony to establish the facts by which to control their operation; although, upon consideration of the parol testimony in that case, the court came to the conclusion that there was a sale in fact, and not a mere security for a loan.

By the statute of 1855, c. 194, § 1, jurisdiction was given to this court in equity "in all cases of fraud, and of conveyances or transfers of real estate in the nature of mortgages." Gen. St. c. 113, § 2. The authority of the courts, under this clause, is ample. It is limited only by those considerations which guide courts of full chancery powers in the exercise of all those powers.

If then the advantage taken of the borrower by the lender, in requiring of him an agreement that he will forego all right of redemption in case of nonpayment at the stipulated time, on an absolute deed with a bond or certificate back, which falsely recites the character of the transaction, representing it to be a sale of the land with a privilege of repurchase, be a sufficient ground for interference in equity by restricting the operation of the deed, and converting the writings into a mortgage, contrary to the expressed agreement, it is difficult to see why the court may not and ought to interpose to defeat the same wrong, when it attempts to reach its object by the simpler process of an absolute deed alone. In each case the relief is contrary to the terms of the written agreement. In one case it is against the express words of the instrument or clause relied on as a defeasance, on the ground that those words are falsely written as a cover for the wrong practiced, or an evasion of the right of redemption. In the other it is without an instrument or clause of defeasance, on the ground that it was oppressive and wrongful to withhold or omit the formal defeasance. In strictness, there is no defeasance in either case. The wrong on the part of the lender or grantor, which gives the court its power over his deed, is the same in both. "For they who take a conveyance as a mortgage without any defeasance are guilty of a fraud." *Cotterell v. Purchase*, Cas. temp. Talbot, 61. See, also, *Bernhart v. Green-shields*, 9 Moore, P. C. 18; *Baker v. Wind*, 1 Ves. Sen. 160; *Mellor v. Lees*, 2 Atk. 194; *Williams v. Owen*, 5 Myl. & Cr. 303; *Lincoln v. Wright*, 4 De Gex & Jones, 16.

As a question of evidence, the principle is the same. In either case the parol evidence is admitted, not to vary, add to or contradict the writing, but to establish the fact of an inherent fault in the transaction or its consideration, which affords ground for avoiding the effect of the writings by restricting their operation, or defeating them altogether. This is a general principle of evidence, well established and

recognized both at law and in equity. *Stackpole v. Arnold*, 11 Mass. 27, 6 Am. Dec. 150; *Fletcher v. Willard*, 14 Pick. (Mass.) 464; 1 Greenl. Ev. § 284; *Perry on Trusts*, § 226.

The reasons for extending the doctrine, in equity, to absolute deeds, where there is no provision for reconveyance, are ably presented by Hare & Wallace in their notes to *Woollam v. Hearn*, 2 Lead. Cas. in Eq. (3d Am. Ed.) 676, and to *Thornbrough v. Baker*, 3 Ib. 694. See, also, Adams, Eq. 111; 1 Sugd. Vend. (8th Am. Ed.) Perkins' notes, pp. 267, 268, 302, 303. The doctrine thus extended is declared, in numerous decisions, to prevail in New York; also in Vermont and several other states. Mr. Washburn, in his chapter on Mortgages, § 1, has exhibited the law as held in the different states, in this particular; and the numerous references there made, as well as by the annotators in the other treatises which we have cited, render it superfluous to repeat them here. 2 Washb. Real Prop. (3d Ed.) 35 and seq.

Upon the whole, we are convinced that the doctrine may be adopted without violation of the statute of frauds, or of any principle of law or evidence, and, if properly guarded in administration, may prove a sound and salutary principle of equity jurisprudence. It is a power to be exercised with the utmost caution, and only when the grounds of interference are fully made out, so as to be clear from doubt. * * *

In the present case, we are able to arrive at the clear and satisfactory conclusion that there was no real purchase of the land by the defendant, either from Tirrill or from the plaintiff; that his advance of the purchase money at the request of the plaintiff created a debt upon an implied assumpsit, if there was no express promise; and that it was the expectation of both parties that the money would be repaid soon and the land re-conveyed. Whatever may have been the intention of the defendant, he must have known that this was the expectation of the plaintiff; and it is most favorable to him to suppose that it was his own expectation also. These conclusions are not in the least modified in his favor by an examination of his answer.

We must declare therefore that in equity he holds the title subject to redemption by the plaintiff in such manner and upon such terms as shall be determined upon a hearing before a single justice.

Decree accordingly.

CHAPTER VIII.

TRUSTS AND THE STATUTE OF LIMITATIONS.

O. and J. KANE v. BLOODGOOD and Others.

(In Chancery, before Kent, Chancellor, 1823. 7 Johns. Ch. (N. Y.) 90, 11 Am. Dec. 417.)

On a re-hearing. The bill, filed July 5th, 1821, stated, that an act was passed, March 30th, 1797, incorporating the Hamilton Manufacturing Society; and that, by an act of the 28th of March, 1809, its duration was extended to the 1st of March, 1821. That on the 1st of April, 1797, the stock of the society consisted of 41 shares, at 1,000 dollars each; that Leonard Gansevoort then owned one share, worth 1,000 dollars, and, afterwards, on the 10th of September, 1804, being entitled to six other shares, he assigned, for a valuable consideration, all the seven shares to J. & A. Kane, with all the profits arising therefrom, from the 1st of May, 1804. That the assignment was under the hand and seal of L. G., and endorsed on the certificates of the shares held by him, under the seal of the society. That the certificates and assignments thereof were delivered by J. & A. K. to the society, who retained them; and, on the 9th of October, 1804, gave new certificates under their seal for the six shares; "thus recognizing the right of J. & A. K. to the shares and the profits thereon from the 1st of May, 1804." That the society, notwithstanding they became trustees to J. & A. K., for the profits on the shares as aforesaid, neglected and refused to pay the profits of the seven shares, from the 1st of May to the 9th of October, 1804, amounting to 565 dollars and 52 cents, though the same were frequently demanded of the society, and of their factor, G. Pearson, under the false and fraudulent pretence, that the profits had been carried to the account of L. G. with the society, and that on such account, he was, on the first of October, 1804, indebted to the society beyond the amount of the profits. That the account of L. G., with the factor, (who received all the rents and profits, and kept all the accounts with the stockholders, and paid them their dividends, under the authority of the society,) stood in the books, on the 9th of October, 1804, with a credit of dividends, to the 1st of May, 1804, and a balance due the society, of 867 dollars and 79 cents, for glass. That the credits for those dividends were for dividends or profits due L. G., on the seven shares. That the further dividends on the seven shares, from the 1st of May to the 9th of October, 1804, were actually credited to L. G., in the books of the factor, to the exact amount of 565 dollars and 52 cents, notwithstanding the assignment of the shares, and the new certificates as above stated. That these dividends were declared, or sanc-

tioned, or authorized by the society, or the directors. That there were never any actual payments of the last mentioned dividends to L. G., and the society, notwithstanding their false and fraudulent pretence aforesaid, received and held the same, in trust for J. & A. K., and are now liable to account for the same, with interest. That they have not paid the same, under the false and fraudulent pretence of their having accounted for the same to L. G.

That James Kane, the survivor of J. & A. Kane, on the 5th of July, 1819, assigned to the plaintiff Oliver Kane, all the said claim to the said dividends on the said seven shares, from the 1st of May to the 9th of October, 1804.

As to so much of the bill as sought a discovery and satisfaction, for or on account of any dividend or profit on seven shares assigned, etc., and accruing from the 1st of May to the 9th of October, 1804, the defendants pleaded the statute of limitations; and that the cause of action, if any, arose above six years before the filing of the bill, etc.

THE CHANCELLOR.¹ The defendants have pleaded the statute of limitations to so much of the bill as seeks satisfaction for the dividends or profits on seven shares of the stock of this society, assigned by Leonard Gansevoort to J. & A. Kane, and which accrued between the 1st of May and 9th of October, 1804. * * *

The cause was set down for hearing, and argued upon the bill and plea; and on the 16th of October, a decretal order was entered, declaring and adjudging the plea to be good and sufficient to so much of the bill as it covered. A re-hearing was applied for, in respect to the claim for the dividends, and granted. * * *

The cause has been well and ably argued upon the re-hearing, and I have attentively examined all the authorities to which I have been referred, or to which I have been directed by my own researches. I have likewise bestowed the best consideration in my power, on the reasoning of the counsel, and the doctrine of the cases, with a view to arrive at a just and satisfactory conclusion.

1. The first point is as to the dividends or profits on the seven shares between May and October, 1804.

The bill charges that L. G., on the 10th of September, 1804, owned seven shares of stock of the Hamilton Manufacturing Society, and that he then, for a valuable consideration, assigned them to J. & A. Kane, with all the profits arising thereon, from the first of May preceding, by an endorsement on the certificates for those shares, and which certificates were under the corporate seal of the society. The certificates were delivered by J. & A. Kane to the society, or to their factor for them, and by them retained, and on the 9th of October, 1804, new certificates for six of the shares were given in lieu of the former ones, "thus recognizing," as the bill charges, "the right of J. & A. Kane to the shares, and to the profits thereon, from the 1st of May

¹ The statement of facts is abridged and part of the opinion is omitted.

preceding." The bill further charges, that the society, notwithstanding they became trustees for J. & A. Kane for the profits aforesaid, refused to pay the profits arising on the seven shares between May and October, though they were frequently demanded of the society and of their factor, and that the refusal was under "the false and fraudulent pretence" that the profits had been carried to the account of L. G. with the society and their factor, and that on such account he was indebted to the society, on the 9th of October, 1804, beyond these profits.

It is further stated in the bill, that the account of L. G. with the factor (and which factor received the rents and profits due to the society, and kept the accounts of the society, and with the stockholders, and paid them their profits under the direction of the society) stood on his books of the date of the 9th of October, 1804, with a credit of dividends to the first of May, 1804, and a balance due to the society of 867 dollars and 79 cents for glass, and that the dividends, so credited, had arisen on the seven shares, and been duly declared and authorized to be paid. The further credit which had accrued to L. G. for profits on the seven shares, from the 1st of May to the 9th of October, 1804, amounted to 565 dollars and 52 cents, and had been actually credited to L. G. on the books of the factor to that amount, and had been duly declared and authorized to be paid on those shares. But it is averred, that there never had been any actual payment of these dividends, so accruing between May and October, to L. G., and that the society, notwithstanding "the false and fraudulent pretence aforesaid," received and held the same in trust for J. & A. Kane, and are now liable to account for the same with all the interest which has accrued thereon. The payment has been withheld under the false and fraudulent pretence that these profits had been accounted for with L. G. The bill then states, that the claim to the dividends on the seven shares, from the 1st of May to the 9th of October, 1804, was duly assigned for a valuable consideration, on the 5th of July, 1819, by J. K., survivor of J. & A. Kane, to the plaintiff O. Kane, who now claims the same.

These are all the material facts in the bill, respecting that particular claim; and I cannot consider that claim as being, on the 9th of October, 1804, or at any time since, a mere technical trust, the creature of a court of equity, and cognizant only in equity. The profits on those shares, from the 1st of May, passed with the assignment of the shares on the 10th of September. They were growing profits, not then ascertained and liquidated or appropriated, and they passed with the shares themselves as incident thereto, not only by the express words, but by the legal operation of the assignments; and the society, by issuing new certificates to J. & A. Kane, on the 9th of October following, founded upon the assignments, did, in the language of the bill, recognize their right under the assignments, and which right was just as valid to the intermediate profits, as to the shares to which they were

attached. The society, as to those profits, were liable to account to J. & A. Kane, as being owners of the stock before those profits had been ascertained and declared. An action of account would have lain against the society, in the character of receivers of so much money for the use of J. & A. Kane. I apprehend, also, that an action on the case, for so much money had and received to the use of the assignees, would have lain against the society. The pretence that those intermediate profits had been accounted for with L. G., the bill avers to have been a false pretence, and that there never had been any payment of those profits to L. G., and that the society held the same in trust for J. & A. Kane. The society had been put in default by a demand and refusal, which is averred. We must assume these allegations of fact in the bill to be just and true; and a plain case of a demand, actionable at common law, is stated in the bill. The facts charged prove the validity and legality of the demand. There is not even color given by the bill to the inference of any real defense on the part of the society, if an action at law had been brought by J. & A. Kane after the 9th of October, 1804. If the factor had credited these profits to L. G., he did it without authority from the society, for none is pretended, and L. G. had no right to ask, demand or receive these profits on the face of his assignment. The right of J. & A. Kane to these profits was not contingent or executory, but absolute; and from the facts charged in the bill, the conclusion was very properly drawn, that the pretences upon which the society refused to accede to the demand of payment, were false and fraudulent.

But it is quite unnecessary to examine into the merits of the defense which the society might have set up in opposition to the claim of J. & A. Kane, in case an action at law or in equity, had been brought in due season. It is sufficient, for the purpose of the present inquiry, that the assignees of the stock had a remedy at law for the profits or dividends; and we have no reason to suppose that their legal remedy would not have been as full and effectual, in reference to that specific demand, as a bill in equity; or that the society had the means of making a better defense at law than in equity. What, then, I may be permitted to ask, is to take this part of the demand out of the statute of limitations? The counsel for the plaintiffs contend, that this is a case of a direct or express trust between trustee and cestui que trust, and so not within the statute; and they have likewise contended, (though I do not perceive that this point has been pressed upon the re-hearing,) that the defendants, upon the dissolution of the corporation, became trustees, by virtue of the act of the 9th of April, 1811, (1 N. R. L. Sess. c. 235,) and were bound, by the directions of the statute, to pay all the corporate debts, of which this was one.

The objection, that the society held the money in question in the character of trustees, and that this was a trust which, upon equity principles, was not within the statute, has been the main object of discussion in the cause; and there is ground for a great deal of embar-

rassment in the examination of the question, arising from the loose manner in which the rule is often mentioned in the books, and the want of consistency, as well as precision, in the series of cases applicable to the point.

I cannot assent to the proposition, that all cases of direct and express trust, and arising between trustee and cestui que trust, are to be withdrawn from the operation of the statute of limitations, notwithstanding a clear and certain remedy exists at law. The word trust is often used in a very broad and comprehensive sense. Every deposit is a direct trust. Every person who receives money to be paid to another, or to be applied to a particular purpose to which he does not apply it, is a trustee, and may be sued either at law for money had and received, or in equity, as a trustee, for a breach of trust. Willes, C. J., in *Scott v. Surman*, Willes's Rep. 404, 405. The reciprocal rights and duties founded upon the various species of bailment and growing out of those relations, as between "hirer and letter to hire, borrower and lender, depositary and person depositing, a commissioner and an employer, a receiver and a giver in pledge," are all cases of express and direct trust; and these contracts, as Sir William Jones observes, (*Jones on Bailment*, p. 2,) are, "among the principal springs and wheels of civil society." Are all such cases to be taken out of the statute of limitations under the notion of a trust, when one of the parties selects his remedy in this court? A review of the decisions will enable us, as I apprehend, to deduce from them a safer and sounder doctrine; and to establish, upon the solid foundations of authority and policy, this rule, that the trusts intended by the courts of equity, not to be reached or affected by the statute of limitations, are those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction of this court.

The earliest case I have met with on the subject, is that of *Harrison v. Lucas*, 1 Ch. Rep. 67, 15 Car. I, in which a plea of the statute of limitations was overruled, and the court was of opinion the plaintiff had no remedy at law. The case is so briefly stated, that we cannot attach much weight to it. We do not know even the cause of action; and it is only to be noted for suggesting the very distinction taken and acted upon afterwards. But in the time of Charles II there were some decisions which applied the doctrine, that trusts were not within the statute, to cases that would not now be deemed to warrant the application.

Thus, in *Heath v. Henley*, 1 Ch. Cas. 20, 2 Ch. Rep. 5, 15 Car. II, the defendant was sued for an account of moneys received by him as a prothonotary of the K. B., for and on behalf of the Ch. J., who was the plaintiff's testator. The plea of the statute of limitations was objected to, on the ground that this was a trust not within the statute, and the defendant was ordered to answer. According to this case, then, every person who receives money to another's use, is a trustee, who is to be placed out of the protection of the statute, if the party elects to

sue him in chancery, instead of suing him at law; but I am persuaded that, upon the authority of the more modern cases, such a proposition cannot be maintained. So, in *Sheldon v. Weldman*, 1 Ch. Cas. 26, 15 Car. II, the bill was for an account of money delivered by the testator to the defendant to compound for his estate sequestered by government, and the statute was pleaded, and the plea overruled, because the money was delivered on a trust. The same observation will apply to this case; an action at law would lie for money had and received; and if the decision was sound equity doctrine, it would follow, that the party seeking for an account of his money could, at his pleasure, escape from the bar of the statute, by shifting a suit from one forum to another. It would likewise put an end to the well known and vastly convenient and remedial action at law for money had and received, in every case where the demand was of six years standing, and it would go very great lengths towards defeating the policy and provisions of the statute. Again; in *Lord Hollis's Case*, 2 Vent. 345, 26 Car. II, £100. was lent by his wife, to be disposed of as she should direct; and on a bill for the money, the plea of the statute was overruled, as this was looked upon as a depositum, and a trust thereon to the wife. This case, if it were a just authority, would, in a great degree, annihilate the action at law for money lent; and as Lord Hardwicke observed, in a case which I shall presently mention, "every bailment might as well be said to be a trust as this." I have, therefore, no difficulty in disregarding the authority of these few loose and carelessly reported cases in the time of Charles II, in which we have only a brief note of the decisions, without any reasoning or illustration.

It is well settled, that the statute of limitations is a good plea in equity as well as at law. This has been the uniformly acknowledged doctrine ever since the statute of Jac. I was enacted. A demand for £2,000 was held barred by the statute, as early as 9 Charles I, in *Kennedy v. Vanlove*, 1 Ch. Rep. 38, and again in *Pearson v. Pulley*, 1 Ch. Cas. 102, 20 Car. II, the Lord Keeper said, he considered 20 years to be a fit time within which a mortgage was to be redeemable, in imitation of the statute of limitations in real actions. So early were the statutes of limitations admitted to be the rule of decision in equity, as well as at law; and though the courts of equity were not within the words of the statutes, the time adopted by them was adopted by analogy, as a fit and just period for a bar in equity of analogous claims. The great and marked exception to this ordinary application of the statute to equity cases, exists in the matter of trusts falling exclusively within equity jurisdiction.

The first case that gave anything like precision to the definition of a trust, not affected by the statutes, was that of *Lockey v. Lockey*, decided by Lord Macclesfield, in 1717. *Prec. in Ch.* 518. That was a bill for an account of the profits of an estate received while the plaintiff was an infant, and the bill was not filed until six years after he came of age. The case does not state the exact character and rela-

tion of the defendant; though I should infer, from one part of the case, that the defendant had been in possession, and received the profits, not as a tort-feasor, but under an agreement, constituting him a trustee for the infant. The Lord Chancellor was clearly of opinion, "that where one receives the profits of an infant's estate, and, six years after his coming of age, he brings a bill for an account, the statute of limitations were a bar to such suit, as it would be to an action of account at common law; for this receipt of the profits of an infant's estate was not such a trust as, being a creature of a court of equity, the statute shall be no bar to, for he might have had his action of account against him at law, and, therefore, no necessity to come into this court for the account. If the infant lies by for six years after he comes of age, as he is barred of his action of account at law, so shall he be of his remedy in this court; and there is no sort of difference in reason between the two cases."

The doctrine of this case is, that the trusts which are not within the statutes, are those which are the creatures of the court of equity, and not within the cognizance of a court of law; and that as to those other trusts which are the ground of an action at law, the statute is, and in reason ought to be, as much a bar in one court as in the other. The statute is a bar to a bill for an account, when it would be a bar to an action of account at common law for the same matter, and for which the party might have had his action of account. The case was so understood by Lord Redesdale, and he cites it with approbation in a case which I shall hereafter refer to, to show that a court of equity is as much barred as a court of law by the statute of limitations.

This single case, resting upon such authority, and with such marked and significant discrimination between the character of the trusts that are within and without the operation of the statute, appears to me to be decisive upon the point now under consideration.

The case of *Lawley v. Lawley*, 9 Mod. Rep. 32, 9 Geo. I, arose soon after, and before the same Lord Chancellor; and it cannot readily be supposed that he intended, by anything in this case, to interfere with a rule he had shortly before so explicitly declared and illustrated. In this case, lands were settled by will on trustees; and one of the trusts was, that if the son's wife survived, she was to receive the rents and profits of the lands, as the same were at that time let. Her husband afterwards greatly increased the rents, and upon his death the wife enjoyed the whole of the rents, making no distinction between the original and the additional rent. A number of years after her death, her executor was sued, by the devisee in tail, being a grandson of the testator, for an account of the surplus rents received by her and by her executor. The plea of the statute of limitations was over-ruled, "because the estate in law was in trustees," and the executor was decreed to account for the improved rents received by her, or by him since her death.

There is no reason given for this decree, but what is to be inferred from the single observation, that the estate in law was in trustees, and that must be understood to mean that the plaintiff in the bill had not the legal title, and could not have maintained an action at law. The legal estate was in trustees, in trust "to the first and every other son and sons of Sir Thomas in tail male," and the plaintiff was such a son. This construction of the case renders Lord Macclesfield perfectly consistent with himself in the preceding case. "It is clear," says Sir Wm. Grant, when commenting upon this case, (2 Merivale, 360), "that under any other circumstances, the demand for these rents would have been barred; but it was considered that so long as the trust subsisted, so long it was impossible that the cestui que trust could be barred. The cestui que trust could only be barred by barring and excluding the estate of the trustee." I cannot but think, with very great respect, that the master of the rolls is not very clear and satisfactory in his commentary upon the case. It was not a suit between trustee and cestui que trust. The trustees seized of the legal estate under the settlement were not sued, and yet he says, the cestui que trust could only be barred, by barring the estate of the trustee. It was a suit by one cestui que trust against the representative of another cestui que trust, for receiving more of the rents than belonged to her; I see no good reason why, as between them, the statute should not have applied, unless we adopt the plain rule upon which alone the decision is intelligible and just, that the plaintiff was a cestui que trust, without any title or remedy at law.

It is a general rule in the books, that there is no statute of limitations to a charge upon an estate. Thus, in *Collins v. Goodall*, 2 Vern. 235, the statute was pleaded to a bill for rent charged on land by will, and it was held that it did not apply; and so again, in the modern case of *Stackhouse v. Barnston*, 10 Vesey, 453, the Master of the Rolls said, that in equity the statute is never permitted to prevail against a legal rent charge. And, in *Norton v. Turvill*, 2 P. Wms. 144, a wife, before marriage, had conveyed her estate in trust to her separate use, and during coverture had borrowed money upon bond. The bond was held void, and after her death a bill was filed against her husband and her executors. The Master of the Rolls held, that her separate estate was a trust estate for the payment of debts; and speaking in reference to that trust, he said the trust was not within the statute of limitations. These cases of charges upon land I have alluded to as going in support of the distinction, which I apprehend is the prevailing one, that the trusts upon which the statute does not operate, are those trusts of which equity has the proper and the exclusive cognizance. I take it for granted as the assumed doctrine in all these cases, that an action at law will not lie in the case of a mere charge upon land, where there is no personal undertaking. And if there be a personal contract, the statute cannot be pleaded at law in

the case of rent, if it be reserved by indenture, or even on a lease in writing, according to what was said in *Hodsden v. Harris* in 2 Saund. 66.

We have a series of decisions of Lord Hardwicke on this subject, in which I think it will appear, that the distinction taken by Lord Macclesfield, in respect to the statute of limitations, has been preserved.

In *Prince v. Heylin*, 1 Atk. 493, Lord Hardwicke held that the statute was a bar to any demand from one tenant in common against another for an account, farther back than six years. "An action of account," he observes, "lies for one tenant in common against another, and such action is expressly mentioned in the statute of limitations; and as there is no remedy at law, (meaning after six years,) there can be no reason for any in equity." All this is perfectly intelligible, and so far applicable as the case before him was one concerning tenants in common. But the observation respecting the limitation was quite unnecessary; for the chancellor admitted that no advantage could be taken of the statute of limitations, as it had neither been pleaded nor insisted on in the answer; and I have referred to the case, because it contained the sanction of Lord Hardwicke to the rule, that where the party has a remedy at law, by an action of account, for the same subject matter for which the bill is filed, "there can be no reason" why the statute of limitations should not apply to the suit in equity, as well as to the suit at law. What shall we say, then, to the other remark in the same case, that "in the case of joint tenants or parceners, there is a mutual trust between them, and they are accountable to each other without regard to the length of time?" Is it possible, I would ask, to make such a distinction between tenants in common and joint tenants, when, by the common law, no action of account lay by one joint tenant, or tenant in common, against another, unless he had constituted him his bailiff; and when, by the statute of 4 Anne, c. 16, an action of account was given equally to joint tenants and tenants in common against each other, for receiving an undue proportion of the profits of the estate? The observation of Lord Hardwicke was entirely extra-judicial; and, probably, it might safely be placed to the account of the inaccuracy of the reporter; as it is well known, that the reports of Atkyns abound in mistakes. Afterwards, in *Brereton v. Gamul*, 2 Atk. 240, which was a case of a bill for discovery, and to be let into possession of real estate, and the statute of limitations was pleaded in bar, Lord Hardwicke held that, if the plaintiff had lost his right by a legal bar, he could have no remedy in equity. This case very clearly shows that, where there is a legal and an equitable remedy, in respect to the same subject matter, the latter is under the control of the same statute bar with the former.

Again, in *Sturt v. Mellish*, 2 Atk. 610, Lord Hardwicke expressly, and after much deliberation, adopted the distinction of Lord Macclesfield, as to the character of the trust, which was to be exempted from the statute. An account was stated between the plaintiff and one

Villa Real, and a considerable debt was due from S. to V. R., and the plaintiff constituted V. R. his attorney, to recover moneys in Portugal, and the whole transaction was with the government of Portugal. The bill was filed against the executor of V. R., for an account, and the statute of limitations was held to be a bar to the suit; and that it was not the case of a trust unaffected by the statute. "A trust," he observed, "is where there is such a confidence between parties, that no action at law will lie, but is merely a case for the consideration of this court; and every bailment might as well be said to be a trust as this." In the next case, of *Pompfret v. Windsor*, 2 Ves. 472, the effect of the statute upon a trust was considerably discussed. It was a bill to have, among other things, execution of a trust for raising £20,000. out of a real estate, at a distance of 27 years; and, although a fine had been levied, Lord Hardwicke held, that a fine by persons in possession and non-claim, the legal estate being in trustees, was no bar to an equitable charge under a deed of trust, and to a claim of the cestui que trust, calling upon the administrator for an execution of the trust of the real estate. The fine was levied by Lady Windsor, as administratrix, and guardian in possession of the real estate, and a trustee of the £20,000., which was the charge upon the land. The possession was not an adverse one, and the claim was purely of equitable cognizance in respect to the charge. Yet even here, Lord Hardwicke observed, that the statute of limitations did not stand in the plaintiff's way, for "it was not pleaded or insisted upon at the bar." And, further, the admissions were so strong, "that, if this had been a case within the statute, and that insisted upon against the account, it had been sufficient to take the case out of the statute." This case, therefore, is in no respect inconsistent with the distinction which has been deduced from the preceding cases. And when we come down to a later period, we shall perceive that the analogy between the legal and the equitable remedy, when both existed in respect to the same subject matter, has been strongly and emphatically declared, and strictly and uniformly preserved.

Thus, in *Smith v. Clay*, 3 Bro. 639, note, Lord Camden observed, that, "as often as parliament had limited the time of actions and remedies to a certain period in legal proceedings, the Court of Chancery adopted that rule, and applied it to similar cases in equity. For when the legislature had fixed the time at law, it would have been preposterous for equity to countenance laches beyond the period that law had been confined to by parliament. In all cases, where the legal right has been barred by parliament, the equitable right to the same thing has been concluded by the same bar." Again, in *Harwood v. Oglander*, 6 Ves. 199, 8 Ves. 106, the question was concerning a trust, in respect to real estate, and time was not allowed to operate as a bar, but by way of evidence, as raising a presumption of ouster. The party claiming did not dispute the title of those in possession, but alleged a title in himself, as tenant in common; and the case contains

nothing more on that point, than the doctrine at law, (*Doe v. Prosser*, Cowp. 217,) that the possession of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion, because such possession is not adverse, but in support of the common title; and in that case, the Master of the Rolls observed, that he "should be sorry to have it understood to be the rule of the court, that there is no limitation whatsoever to trust estates; and that, let the legal title once get into a trustee, the *cestui que trust* may permit others to enjoy the property, and come to this court at any distance of time for an account. It would be perfectly alarming." He expressed a strong opinion against granting the account farther back than six years.

In *Stackhouse v. Barnston*, 10 Ves. 453, the Master of the Rolls said, that though the statute of limitations does not apply to any equitable demand, yet equity takes the same limitation in cases that are analogous to those in which it applies at law; and he said, that an account of rents and profits was limited to six years, by analogy to legal limitations.

This application of the statute by analogy cannot well be made to cases of those peculiar trusts which are the mere creatures of equity—for there is no ground for comparison; but when the same subject matter of the demand in equity can also be made the subject of an action at law, the rule of analogy applies in all its force, as Lord Redesdale observed, in *Bond v. Hopkins*, 1 Sch. & Lef. 413, the statute of limitations does not apply in terms to proceedings in courts of equity, but equitable titles are affected by analogy to it. If the equitable title be not sued upon, within the time within which a legal title of the same nature ought to be sued upon, to prevent the bar of the statute, the court, acting by analogy to the statute, will not relieve.

Lord Redesdale, afterwards, in *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 607, went much more at large into the doctrine of the limitation of actions in equity; and the principle of that case is, that if the equitable title be not acted upon in the same time the legal title should be, it is barred. "Courts of equity are bound to yield obedience to the statute of limitations upon all legal titles and legal demands, and cannot act contrary to the spirit of its provisions." I understand this proposition to mean, that if the party has legal title, and a legal right of action, and, instead of proceeding at law, resorts to equity; instead of bringing his action of account, or *detinue*, or case, for money had and received at law, files his bill for an account, the same period of time that would bar him at law will bar him in equity. This is the principle that pervades the cases. Lord Redesdale proceeds to observe, that "Courts of equity have constantly guided themselves by the principle, that wherever the legislature has limited a period for law proceedings, equity will, in analogous cases, consider the equitable rights as barred by the same limitation. I take it for granted," he says, "that the position that trust and fraud are not within the statute is qualified just as Lord Macclesfield qualifies it in the case of *Lockey*

v. Lockey." We have already seen in what manner Lord M. qualifies the position as to trusts; and what stronger sanction could Lord Redesdale have given than this to the principle contained in that leading case, and upon which this whole argument rests?

He adds, further, in this case, that if the trustee is in possession, (speaking of real estate), and does not execute his trust, the possession of the trustee is the possession of the cestui que trust; and if the only circumstance be, that he does not perform his trust, his possession operates nothing as a bar, because his possession is according to his title. As, in the case of a lessee for years, though he does not pay his rent for 50 years, his possession is no bar to an ejectment after the expiration of his term, because his possession is according to the right of the party against whom he seeks to set it up. Again, he says, that every new right of action in equity that accrues to the party, whatever it may be, must be acted upon, at the utmost, within 20 years. If a mortgagee has been in possession for a great length of time, but has acknowledged that his possession was as mortgagee, and therefore liable to redemption, a right of action accrues upon that acknowledgment. But if not pursued within 20 years, the statute may be pleaded; and so in every case of equitable title, (not being the case of a trustee, where possession is consistent with the title of the claimant,) it must be pursued within 20 years.

It is easy to perceive, that the doctrines here laid down are the same as govern courts of law in analogous cases, and the statute of limitations receives the same construction and application at law and in equity. It is equally said, that fraud, as well as trust, is not within the statute, and it is well settled that the statute does not run until the discovery of the fraud; for the title, to avoid it, does not arise until then, and pending the concealment of it, the statute ought not in conscience to run; but after the discovery of the fact imputed as fraud, the statute runs as in other cases. This was the true ground of the case of *Booth v. Lord Warrington*, 1 Bro. P. C. 455, and this was the rule declared in the case of the *South Sea Company v. Wymondsell*, 3 P. W. 143, and Lord Redesdale, in the case on which I have so long dwelt, approves of the rule.

In the case now before me, if the directors of the Hamilton Manufacturing Society had passed the dividend to the credit of J. & A. Kane, and there had been no demand and refusal, the possession of the fund would have been consistent with the title of the cestui que trust, and the statute would not have been a bar. But, after a refusal to pay, and a denial of title, the possession becomes adverse, and it is as just and reasonable that the statute should run and bar the party, who is apprised that his right is denied, and yet sleeps on that right, as that it should bar the party who has knowledge of the fraud, and neglects his remedy.

The case of *Beckford v. Wade*, 17 Vesey, 87, arose upon a construction to be given to an exception in the statute of limitations of the

Island of Jamaica, which declared that the act should not be held to extend to a possession held by trustees. The master of the rolls held, in that case, that the exception meant not constructive trusts, but only direct or express trusts between cestui que trusts and their trustees, upon which length of time does not bar, and ought to have no effect, and that they did not extend to every equitable question relative to real property.

The case concerned real estate; and the observation of Sir Wm. Grant, and which is so frequently met with in the books, that time does not bar a direct trust, as between trustee and cestui que trust, is precisely the same principle that applies at law to tenants in common, where the statute does not run but from actual ouster, because the possession of one is not adverse to the right of the other, but is in support of the common title. It does not bar, so long as the trust is a continuing and acknowledged trust. In *Harwood v. Oglander*, already cited, it was considered by Lord Alvanley, and afterwards by Lord Eldon, that if a trust subsisted, so that the trustee could recover as having the legal estate, it would follow, that the right of the cestui que trust, as against the trustee, could not be barred. But supposing the trustee was to deny the right of the cestui que trust, and assume absolute ownership, is there any case in equity that would allow the latter his remedy, beyond the period limited for the recovery of legal estates at law? So long as the trust is a subsisting one, and admitted by the act or declarations of the parties, no doubt the statute does not affect it; but when such transactions take place between trustee and cestui que trust, as would, in the case of tenants in common, amount to an ouster of one of them by the other, I can hardly suppose that a court of equity would consider length of time afterwards as of no consequence. There is no good reason why the statute of limitations should not apply to such a case, as well as to cases of constructive trusts, and to cases of detected fraud, and to all other cases in which the statute is assumed as a rule of decision.

"The general doctrine in this country," says the Master of the Rolls, in *Beckford v. Wade*, "is against applying statutory limitations to cases of trust. As our statute bars only legal remedies, of course it has no direct operation upon trusts, for which there was no remedy but in courts of equity." This last sentence shows what kind of trusts Sir W. Grant had in contemplation, when he said the statutory limitations did not apply to trusts; and he assumes as correct the distinction between those trusts which are the creatures of equity, and known there only, and the other cases of trust, over which courts of law have concurrent jurisdiction. It is as to those "trusts for which there was no remedy but in courts of equity" that the statute does not operate; and Lord Camden, as we have seen, considered it as preposterous, that the statute should not apply to the equitable, when it would apply to the legal remedy.

The successor of Lord Redesdale expressed his opinion on the application of the statute to equity cases in *Medlicot v. O'Donnell*, 1 Ball & B. 156, and declared that he considered the statute of limitations as founded upon the soundest principles, and the wisest policy; and that the Court of Chancery, for the peace of families, and to quiet titles, was bound to adopt it in cases where the equitable and legal titles so far corresponded, that the only difference between them was, that the one must be enforced in a court of equity, and the other in a court of law. He added, further, that where there was no continuing or subsisting trust, the same principle would apply. In *Cholmondeley v. Clinton*, 2 Merivale, 93, there was much discussion on this subject. The plaintiff claimed to be entitled to the equity of redemption of a mortgaged estate which was subsisting in trustees, and he prayed that the defendant might be decreed to re-convey, and to deliver up possession, and to account for the rents and profits. The defendant insisted, that trustees had been in quiet possession for upwards of twenty years, and he claimed the benefit of the statute. The master of the rolls, in giving his opinion, stated, that it was admitted that an equity of redemption subsisted in the case, and so long as it did subsist, the question to whom it belonged was open, and some person was entitled to redeem it. The trust subsisted. The mortgagee was trustee of the legal estate for the plaintiff, who had the equity of redemption. He held that the statute did not apply, because the possession of twenty years was not in the character of owner of the legal estate, nor under any claim of being so entitled. The subsistence of the mortgage had been all along recognized. Even at law, mere possession is not sufficient to bar the claim of the true owner; there must be something tantamount to a disseisin.

I refer to this case, as containing a clear illustration of what is meant by the doctrine that no time bars in the case of a direct or expressed trust, continuing and subsisting, as between the parties to the trust. In that case, the trustee had done nothing adverse to the title of the plaintiff. The legal estate remained untouched, and the case contains, throughout, an acknowledgment of the principle, that equitable demands will be barred by the same length of time, by which, if it were a legal question, in an action by which the party sought to recover, it would be barred.

There have been some decisions in this court, which have been referred to, as being unfavorable to the plea.

In *Decouche v. Savetier*, 3 Johns. Ch. 216, 217, 8 Am. Dec. 478, I observed, that no time bars a direct trust, as between trustee and cestui que trust, so long as the trust subsists, and I referred to the case of *Cholmondeley v. Clinton*. But these general expressions must be taken under the same restriction that is applied to them when used in the books. We have seen the sense in which they must have been used by the master of the rolls, in one of the cases mentioned; and

the same undefined language is used by Lord Hardwicke, in *Lewellin v. Mackworth*, 15 Vin. 125, T, pl. 1, note, and by Mr. J. Ashurst, as one of the commissioners in *Townsend v. Townsend*, 1 Cox, 28. The maxim is, doubtless, to be received subject to the distinctions which the decisions authorize. But I am now led to apprehend, in consequence of a more thorough examination of the question, that I did not lay sufficient stress in that case, upon the circumstance, that by the statute law of this state actions at law, of debt, detinue, or account, may be brought for legacies and distributive shares. In England, it is the proper and exclusive province of the Courts of Equity to enforce the payment of legacies and distributive shares; and, following the English cases, I concluded that the statute of limitations did not apply to such demands. The rule, as to a legacy, has sometimes been said to be upon the ground of a trust, and sometimes that it is impossible to say from what time the statute shall run, as the legacy is payable when the executor shall have possessed assets sufficient for debts and legacies, which may be at an indefinite time. The master of the rolls, in *Smallman v. Lord Hamilton*, 2 Atk. 71, seemed rather to be dissatisfied with the doctrine, that the statute of limitations was not applied to a legacy, as well as to other cases; but I assume it to be well settled in England that the statute does not apply to legacies and distributive shares, and that the remedy, to enforce payment, must be sought in chancery. As we, however, have a legal remedy provided, by action at law, it becomes a very serious question, whether this Court, possessing now only a concurrent jurisdiction, is not bound, upon established principles, to apply the same limitation to the equitable, which is given to the legal remedy? And if we assume it to be the rule at law, that the statute of limitations does apply to actions at law, for legacies and distributive shares, then in that view, and in that view only, I have doubts as to the soundness of the decision in *Decouche v. Savetier*.

In the still more recent case of *Coster v. Murray*, 5 Johns. Ch. 522, I referred, generally, to what was said by me in the preceding case, that the statute did not reach to matters of direct trust, as between trustee and cestui que trust; and I held, that the statute did not apply to the case of a gratuitous bailment or trust. But though that decree was affirmed in the Court of Appeals, yet, I understand, it was upon other ground than that upon which I had rested the decree, and that the judges of the Supreme Court did not consider it as the case of a trust not within the reach of the statute, because an action at law, of account, or for money had and received, could have been sustained for the same matter, and the equitable remedy, in a case of concurrent jurisdiction, was subject to the same limitation as the legal. If I am not misinformed as to the decision, (for the case has not, as yet been reported,) it is a decisive authority in favor of the doctrine which I have now endeavored to deduce from the history of the cases; and

it was the discussion upon the appeal in that very case, that led me to suspect that I had been misled by some of the earlier decisions, in the time of Charles II, on which I have now ventured freely to comment, and by the exceedingly loose manner in which the rule, as to trusts, had been spoken of in the books.

My conclusion upon this branch of the plea is, that J. & A. Kane, according to the statement in the bill, had a legal cause of action existing in 1804, for the dividends or profits arising on the seven shares, and that, upon the demand and refusal charged in the bill, interest commenced, and a right of action accrued against the society. That right, not having been pursued within six years, the plaintiffs are barred at law, and by analogy and in obedience to the statute, they are, upon established principles of equity, equally barred in this Court. * * *

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